87-83

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF PITTSBURGH, PENNSYLVANIA, PAUL J. IMHOFF, Superintendent of the Pittsburgh Bureau of Building Inspections, and ROBERT J. LURCOTT, Director of the Pittsburgh Department of City Planning,

Petitioners,

v.

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSEWEIR, HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK and JOHN KING, on their own behalf and on behalf of all others similarly situated, and ALCOHOLIC RECOVERY CENTER, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can substantive mistakes by administrative bodies in applying local ordinances create a federal claim so long as correction is available through the state's judiciary?

2. Is the *Wilson v. Garcia*, 105 S.Ct. 1938 (1985) mandate that Section 1983 actions be brought within the time prescribed for filing personal-injury actions appropriate for cases seeking to overturn the decision of an administrative agency?

3. Can *Younger v. Harris*, 401 U.S. 37 (1971) abstention be avoided in challenging ongoing state administrative agency procedures by having an interested third party institute a federal action?

4. Do third parties have standing under Article III of the U.S. Constitution to challenge the propriety of an administrative decision where they have no cognizable property interest affected by that administrative decision?

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, the City of Pittsburgh, Pennsylvania, Paul J. Imhoff, Superintendent of the Pittsburgh Bureau of Building Inspection, and Robert J. Lurcott, Director of the Pittsburgh Department of City Planning.

Appellants and Defendants in the District Court.

The Respondents below were Dennis Sullivan, Michael Diskin, James Roseweir, Hershel Heilig, Wayne Jackson, John Clark and John King, on their own behalf and on behalf of all others similarly situated, and Alcoholic Recovery Center, Inc.

Appellees and Plaintiffs in the District Court.

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The Petitioners, the City of Pittsburgh, Pennsylvania, Paul J. Imhoff, Superintendent of the Pittsburgh Bureau of Building Inspections, and Robert J. Lurcott, Director of the Pittsburgh Department of City Planning, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Ap-

peals for the Third Circuit, entered in the above-captioned proceeding on January 23, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1) is reported at 811 F.2d 171 (3rd Cir. 1987). The District Court's ruling granting respondents' preliminary injunction is reported at 620 F. Supp. 935 (W.D. Pa. 1985). (B-1).

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1987. Petitioners' filed a timely Petition for Rehearing under Federal Rules of Appellate Procedure 35(b) and 40(a). On May 20, 1987, the Petition was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Article III, Section 2, of the United States Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States, — between citizens of the same State claiming Lands under Grant of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State. . . .

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress.

STATEMENT OF THE CASE

Plaintiffs filed a class-action suit seeking a preliminary and permanent injunction, alleging that the City of Pittsburgh and its officials ("CITY") violated the civil rights of a certain class of recovering alcoholics by not granting administrative permits to occupy certain properties as a residential treatment program for recovering alcoholics. The class represents recovering alcoholics who reside or want to reside at facilities owned or leased by Alcoholic Recovery Center ("ARC").[1] To occupy these premises, ARC needed a "conditional use" approval which is granted by City Council sitting as an *administrative body*.[2] The City's Zoning Code provides that a conditional use for an "institution facility" can only be granted if certain established criteria in the Zoning Ordinances are met. (See A-4).

Class-action plaintiffs and ARC contended that Council violated their civil rights when it issued an administrative decision on November 1, 1983, denying ARC's request for a conditional use to occupy a property at 800 E. Ohio Street as an "institutional facility" with 55 alcoholics and 1216 Middle Street as an "group care facility" because Council had no basis for denying ARC's application.

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[1] ARC made a motion at the preliminary injunction hearing to intervene in the proceeding. The Court held its motion in abeyance but granted its motion to intervene when the Court issued its preliminary injunction decree.

[2] There is no dispute that City Council was acting as an administrative agency and its decisions were appealable. *North Point Breeze Coalition v. City of Pittsburgh*, 60 Pa. Commonwealth Ct. 298, 431 A.2d 398 (1981).

Under the Judicial Code of Pennsylvania, an appeal must be taken within 30 days of that order. 42 Pa. C.S. 5571. No appeal was taken by ARC from that order.

Class-action plaintiffs and ARC contended that City Council again violated their civil rights when, on June 6, 1985, it issued an administrative decision to deny ARC's application to use 800 East Ohio Street residential treatment center for 25 individuals because Council had no grounds for denial. ARC appealed this denial to the Court of Common Pleas of Allegheny County; that appeal is still pending.

The District Court entered a preliminary injunction finding that Council's administrative decision was improper and ordered the City, among other things, to issue a conditional use in order that ARC could occupy all properties at issue in both the 1983 and 1985 applications. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Finding That Administrative Decisions Subject to State Judicial Review Give Rise to Section 1983 Liability Is In Conflict With Decisions of the First, Second and Seventh Circuits.

The Third Circuit, in what appears to be a reversal of its former position in *Cohen v. City of Philadelphia*, 736 F.2d 81 *cert. denied*, 469 U.S. 1019, 105 S.Ct. 4341, has held in this case that substantive mistakes by administratives bodies in applying local ordinances create a Section 1983 claim, even though correction is available through state court proceedings. (A-27 fn. 14). While this view is in accord with decisions of the Fifth Circuit, it is in conflict with decisions in the First, Second and Seventh Circuits.[3]

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[3] The Third Circuit misinterpreted this Court's decision in *City of Cleburne v. Cleburne Living Center*, —— U.S. ——, 105 S.Ct. 3249 (1985), stating that this Court held that an administrative decision subject to state court review can give rise to a Section 1983 claim. In *Cleburne*, that City Council turned down a "special

The Fifth Circuit in *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir., 1986), also held that a decision by an administrative agency, subject to state court review, can give rise to a federal claim. Twenty months after being denied a zoning variance by a Zoning Hearing Board, plaintiff filed a Section 1983 action contending, *inter alia*, that his substantive due process rights were violated because the Board twelve months after his request was denied granted a permit to a similarly situated business. Even though plaintiff could have appealed his denial through Texas state courts, a Panel of the Fifth Circuit held that plaintiff had a right to determine if the seemingly arbitrary "denial of the parking variances were based on fact." 754 F.2d 1251, 1256 (5th Cir., 1985), applying the normal standard that administrative action could be reversed if its decision was arbitrary or capricious or constituted an error of law. The entire Fifth Circuit overturned the Panel decision holding that the Zoning Board issued a legislative rather than administrative decision. Under that holding, a Zoning Board's decision need only meet the "rational basis" test applicable

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use" permit for a home for the mentally retarded under an ordinance which permitted hospitals, sanitariums, nursing homes or homes for convalescents or aged as of right but required a special use permit issued legislatively by Council before a mentally retarded home could be established. This Court held that Cleburne City Council failed to articulate any reasons when it denied the special use permit that made the classification "rationally related" to any legislative goal, and hence, the denial of the special use permit was improper.

Cleburne is inapplicable since the City's "[z]oning code as drafted passes constitutional muster," and under Texas law, the grant or denial of special use permits are legislative actions by Councils and not subject to judicial review. See *Shelton v. City of College Station*, 780 F.2d at 487. See *Sherwood Lanes, Inc. v. City of San Angelo*, 511 S.W. 597 (Tex. 1974); *Marriot v. City of Dallas*, 644 S.W.2d 469 (Tex. 1983). Under Pennsylvania law, conditional uses granted or denied by Councils are administrative decisions and subject to judicial review. See *North Point Breeze Coalition v. City of Pittsburgh, supra.*

to legislation, rather than the "arbitrary and capricious" test normally applicable to administrative agency decisions, in order not to violate an appellant's substantive due process rights. The dissent pointed out the decision's illogic when it stated:

> By a stroke of a judicial pen, zoning boards of adjustment have become legislatures and the action of every . . . municipal agency, however petty, is now entitled to the same deference as the deliberate enactments of the highest state legislature. (780 F.2d at 486).

The Fifth Circuit's characterization of a Zoning Board's decision as legislative in character and the application of a "rationally related test" illustrate the difficulty the Circuits are having in dealing with local administrative agency decisions under Section 1983 which calls for clarification by this Court.

The First Circuit, however, has consistently held that a Section 1983 claim may not be based on administrative agency denial of a permit where state court remedies are available even if the denial was malicious, in bad faith, and for invalid and illegal reasons. See *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1526-28 (1st Cir., 1983); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir., 1981), *cert. denied*, 459 U.S. 989; *Quinn v. Bryson*, 739 F.2d 8 (1st Cir., 1984); *Raskiewicz v. Town of New Boston*, 754 F.2d 38 (1st Cir., 1985), *cert. denied*, 106 S.Ct. 135.

The Second Circuit in *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir., 1985), and the Seventh Circuit in *Alberby v. Reading*, 718 F.2d 245 (7th Cir., 1985), have adopted similar holdings to that of the First Circuit. All of these circuits have adopted the view that if an adverse administrative agency decision is made subject to a judicial claim, it will have an adverse impact on local regulatory schemes and will have the federal courts sit as overseers of local law and burden an already overburdened federal court system.

In *Yale Auto Parts, Inc. v. Johnson, supra,* the Second Circuit provided the underlying rationale that militated against holding administrative agency subject to state court review when it stated (p. 58):

> ". . . Section 1983, upon which plaintiffs depend, does not guarantee a person the right to bring a federal suit for demand of due process in every proceeding in which he is denied a license or permit. If that were the case, every allegedly arbitrary denial by a town or city of a local license or permit would become a federal case, swelling our already overburdened federal court system beyond capacity. A federal court should not . . . sit as a zoning board of appeals." (Citations omitted).

This echoes this Court's decision in *Parratt v. Taylor,* 451 U.S. 526 (1981), where, in rejecting the argument that every negligent act of a state official could give rise to a Section 1983 violation, it stated (p. 544):

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."

If the decision of the Third Circuit and other decisions that are in accord prevail, they would make the Fourteenth Amendment a font of zoning, civil service, environmental and all local agency laws superimposed upon whatever state and local regulatory scheme exists and is administered by state and local governments. While the

cases cited deal with zoning administrative decisions, the rationale applies to all administrative agency decisions.

Not only would the Third Circuit's view superimpose the federal system on local regulatory schemes, it would extend the time for filing appeals from administrative agency decisions from the thirty-day period provided in Pennsylvania (42 Pa. C.S.A. § 5571) and in most states, to two years from the date of the local administrative agency decision. (42 Pa. C.S.A. § 5524). This forces municipalities to have to wait two years before an issue can be finally considered settled. While a two-year statute is appropriate for personal injury cases, it certainly imposes an enormous burden on a regulatory scheme where state and local agencies issue hundreds of decisions annually and where a thirty-day statute is normal to challenge their decisions.

Such a doctrine that the Third Circuit has adopted would also destroy the local regulatory scheme in a much more insidious way than the burden placed on the scheme described above. Recognizing that it is important to shield "referee's" decisions from collateral attack, judges, arbitrators and even baseball umpires are not called upon to explain their decisions once issued. The only procedure to challenge that decision is through appeals under the pertinent regulatory scheme. If the view of the Third Circuit is allowed to stand, local administrative agency members would be called upon by either party to show that his or her vote was based on proper or improper factors. To ferret out factors that would be used to challenge an agency member's vote, discovery would be undertaken which would examine all factors used to arrive at his or her vote on the matter, including state of mind and personal conducts and beliefs that could be used to infer that the agency member's vote was based on improper factors or beliefs. This, coupled with Section 1988 liability and attendant publicity, will cause local administrative agency officials who are mostly unpaid to examine whether it is worthwhile to continue serving.

II. This Court Should Consider Whether a Personal Injury Statute of Limitation Is the Most Appropriate Statute of Limitation to Employ for Section 1983 Violations Committed by an Administrative Agency.

If this Court decides that administrative agency decisions subject to judicial review can give rise to a Section 1983 liability, this Court should reconsider its opinion in *Wilson v. Garcia*, —— U.S. ——, 105 S.Ct. 1938 (1985), which provides that the statute of limitations for personal injury is an appropriate statute to employ in Section 1983 violations. For the reasons set forth in Section I, a more appropriate statute of limitations would be the time set for taking an appeal from an adverse administrative decision. In Pennsylvania and most states, that would be thirty days.

III. The Third Circuit's Decision Not to Abstain During Pendency of Appeals From Administrative Agency Because the Parties Are Not Identical Is In Conflict With Decisions of This Court.

In *Ohio Civil Rights Commission v. Dayton Christian School*, —— U.S. ——, 106 S.Ct. 2718 (1986), this Court held that the *Younger v. Harris*, 401 U.S. 37 (1971), absention applied during a pending administrative appeal and subsequent state court adjudication of that appeal. The Third Circuit refused to apply *Dayton Christian School* because only ARC and not class-action plaintiffs was a party to the administrative action and zoning appeal.

If allowed to stand, the Third Circuit decision would make this Court's decision in *Dayton Christian School* meaningless. The Third Circuit's interpretation would mean that a federal court does not have to abstain unless all the parties are identical in the state administrative proceeding even though the federal action would decide the same issues the state administrative agency process. Under that reasoning, any state court defendant will be able to ignore the *Younger* line of cases so long as the

defendant is able to enlist additional parties to his federal complaint who profess an interest in the outcome of the state court litigation.

The Third Circuit's decision that abstention was not warranted because the parties were not identical also violates this Court's decision in *Hicks v. Miranda*, 422 U.S. 332, 349 (1975), where this Court stated that where the interests of the parties in the federal action are intertwined, abstention is warranted even though some of the federal parties are not parties to the state court action. Class-action plaintiffs' interest in living at ARC facilities make them inextricably intertwined with ARC's interests, making abstention in this case appropriate. This would permit "state courts to try state cases free from interference from federal courts." *Younger*, 401 U.S. at 43, and not allow the sham of having interested third parties bringing federal actions to avoid the application of the abstention doctrine.

IV. The Third Circuit Decision That a Zoning Decision Can Be Challenged by One Who Is Not a Party to That Action Is at Variance With Article III of the Constitution.

The Third Circuit held that class-action plaintiffs had standing to bring an action based on an administrative agency denial of ARC's zoning applications to which the class-action plaintiffs were not parties. Through this decision, the Third Circuit has enunciated a principle that third parties to an administrative agency decision have a right to challenge that decision through a Section 1983 action. The Third Circuit has misapprehended the decision of the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), and *Warth v. Seldin*, 422 U.S. 490 (1970).

In Pennsylvania, only one who has a real property interest can make application for a land use permit. See

Poster Advertising Co. v. Zoning Board of Adjustment, 408 Pa. 248, 182 A.2d 521, (1962); *Logan Square W. Association v. Zoning Board of Adjustment of Philadelphia*, 32 Pa. Commonwealth Ct. 277, 379 A.2d 632, (1971). Not having any legally cognizable right to make an application for a permit, class-action plaintiffs cannot collaterally challenge in a federal action the propriety of the City's administrative decision to deny ARC's zoning application because they had no rights that could have been violated. This Court has held that a litigant has to demonstrate a concrete and particularized injury to himself and is permitted to assert only his own legal rights as a ground for decision in his favor, not those of third parties. *Warth v. Seldin, supra*, 422 U.S. at 499. Moreover, Article III standing must be more than a "vehicle for the vindication of the value interests of concerned bystanders." *Valley Forge, etc. v. American United, etc.*, 454 U.S. at 473.

The indirect nature of class-action plaintiffs' injury is best shown by asking "what if" ARC decided not to participate in the action and relocated its facility. Would class-action plaintiffs have a right to maintain that the properties in question had to be used for them, even though the owner had no desire to continue to use the property? If this type of "injury" created standing, every administrative decision, whether zoning or to fund or not to fund a particular program, could then be challenged by third parties whether or not the property owner desire to continue to occupy the property. To have standing, a party's rights have to be independently maintainable, and not, as here, dependent on the rights of another. Otherwise, every adverse zoning decision could be challenged by third parties, e.g., a shopper who wants to shop at a shopping mall which was denied zoning approval.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 85-3607

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSENWEIR, HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK AND JOHN KING, on their own behalf and on behalf of all others similarly situated Arc House, Inc.

(Plf Intervenor)

v.

THE CITY OF PITTSBURGH, PENNSYLVANIA, PAUL J. IMHOFF, Supt. of Pittsburgh Bureau of Building Inspections, ROBERT H. LURCOTT, Director of the Pittsburgh Dept. of City Planning

Appellants,

v.

THE COUNTY OF ALLEGHENY, PENNSYLVANIA and the ALLEGHENY COUNTY INSTITUTION

Argued Sept. 11, 1986

Decided Jan. 23, 1987

As Amended March 5, 1987

Rehearing and Rehearing En Banc
Denied May 12, 1987

D.R. Pellegrini (argued), City of Pittsburgh, Dept. of Law, Pittsburgh, Pa., for appellants.

John Stember, Donald Driscoll (argued), Catherine Martin, Daniel Haller, Pittsburgh, Pa., for D. Sullivan, M. Diskin, J. Roseweir, H. Heilig, W. Jackson, J. Clark, J. King.

Lee Markovitz, Anton W. Bigman, Pittsburgh, Pa., for Alcoholic Recovery Center, Inc.

Before ALDISERT, HIGGINBOTHAM and HUNTER, Circuit Judges.

OPINION

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.

This appeal arises from a class action brought by a group of recovering alcoholics to enjoin the closing of alcoholic treatment centers by the City of Pittsburgh, Pennsylvania. Alcoholic Recovery Center, Inc. ("ARC"), the non-profit corporation that manages and runs the treatment centers that treat class action plaintiffs-appellees, intervened in the action before the district court. The City now appeals the grant of the preliminary injunction enjoining it *pendente lite* from closing the treatment centers and requiring it to issue zoning and building permits and to distribute certain federal Community Development Block Grant ("CDBG") funds. Pursuant to 28 U.S.C. § 1292(a)(1), we have jurisdiction over the district court's interlocutory order granting preliminary injunctive relief. For the reasons set forth below, we will affirm the district court's order.

I.

Since 1966, ARC has treated alcoholics in several facilities in the North Side section of Pittsburgh, Pennsylvania and elsewhere in Allegheny County. These facilities, located at 422-424 Tripoli Street, 1216 Middle Street and 800, 814, 816, 818 and 820 East Ohio Street in Pittsburgh and at 1831 Hulton Road, Verona and R.D. 1, Avella in Allegheny County, have served primarily low-income persons. In accordance with the then-existing

Zoning Code of Pittsburgh,[1] ARC, on four occasions between 1966 and 1977, submitted applications for conditional use or occupancy permits required by the Code.[2] The Pittsburgh City Council never acted upon these Planning Department applications, although the Pittsburgh Planning Commission did recommend approval of the 1977 application. Despite its failure to act upon ARC's permit applications, the City sent a letter of commendation to ARC on March 23, 1977.

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[1] Since 1977, Pittsburgh has amended its Zoning Code, which regulates the use of real property within the City. *See infra* note 3. To the extent the City's actions under the pre-1977 Code belie a non-discriminatory purpose, it is factually relevant. Legally, however, the pre-1977 Code is of no consequence since the City took its challenged action under the Code as amended in later years.

[2] At all relevant times, the Zoning Code has established a tripartite process for the acquisition of a conditional use permit. First, the person or organization seeking the permit must submit an application to the City's Planning Department, which is responsible for processing such applications, as well as distributing CDBG funds. If the Planning Department tentatively concludes that the applicant meets applicable zoning and spacing requirements, it makes a non-binding recommendation of approval and sets a date for a hearing before the Planning Commission; individual Department staff members may also make non-binding funding suggestions as the applications are considered. Second, at the Commission hearing, of which affected community residents are apprised and to which they are invited, the applicant may present testimony or evidence which he believes is supportive and may respond to questions posed or concerns raised by community members. Affected parties may present testimony or evidence either in support of or in opposition to the application. After consideration of testimony and evidence, the Commission makes a non-binding recommendation of approval or disapproval which is forwarded to the City Council. Third, the Council holds a hearing at which the applicant and affected parties may present testimony or evidence and at which the applicant may address questions or concerns raised by community members or the Council. After the hearing, the vote of a simple majority of the Council determines whether or not the application is approved. App. at 415a-417a; 476a. Determinations at every stage of the process are to be made in accordance with the Zoning Code.

On September 15, 1980, Pittsburgh amended its Zoning Code with respect to facilities such as those operated by ARC.[3] Thereafter, in 1982, ARC applied for conditional use permits for group care facilities at 1216 Mid-

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[3] The Code, as amended in 1980, establishes three classes of group homes, which by definition provide specialized health, social, and rehabilitative services and which, in accordance with the amended Code, must acquire conditional use permits to operate. "Group residence facilities" serve seven residents and house a total of nine persons; "group care facilities" serve seventeen residents and house a total of nineteen persons; "institutional facilities" serve and house more than nineteen persons. Issuance of a conditional use permit is conditioned upon fulfillment of certain requirements set forth in § 993.01. The grounds for denial of a conditional use permit are too numerous to set forth in full here; ARC's conditional use application was purportedly denied on the basis of three sections. The first, § 993.01(a)D, provides:

> No conditional use shall be recommended for approval if any of the following findings is made:
>
> (1) That the establishment, maintenance, location and operation of the proposed use will be detrimental to or endanger the public health, safety, morals, comfort or general welfare; and
>
> (2) That the proposed use will be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes permitted, nor substantially diminish or impair property values within the neighborhood; and
>
> (3) That the establishment of the proposed use will impede the normal and orderly development and improvement of surrounding property for uses permitted in that district; and
>
> (4) That adequate utilities, access roads, drainage and other necessary facilities have not been or will not be provided; and
>
> (5) That adequate measures have not been or will not be taken to provide ingress and egress designated so as to minimize traffic congestion in the public streets; and
>
> (6) That the proposed use will not, in all other respects, conform to the applicable regulations or the district in which it is located.

The second and third sections, §§ 993.01(a)A10 and 993.01(a)A44 together provide that institutional or group care facilities will be denied conditional use permits if they fail to meet lot size requirements of their zoning districts. App. at 1124a-1126a.

dle Street and 422-424 Tripoli Street and for an institutional facility at 800, 814, 816 and 818 East Ohio Street, seeking approval for a total of 99 residents. The Pittsburgh Planning Department recommended approval for only 1216 Middle Street and 800 East Ohio Street for a total occupancy of 65 residents. One senior planner for the Planning Department also recommended that the City of Pittsburgh allocate $75,000 to $100,000 of CDBG funds for necessary renovations of ARC facilities.

On September 14, 1982, at a public hearing held by the Planning Department, the East North Side Area Council, a community organization, expressed hostility towards ARC and reluctance about accepting a treatment center for alcoholics in its neighborhood. Later, in early May, 1983, ARC responded to potential overcrowding in the Allegheny County Jail by announcing it would accept persons convicted of driving while under the influence of alcohol for treatment in its North Side Facilities, apparently raising some concern in the surrounding community. On July 12, 1983, City Councilman William Robinson, on behalf of the East North Side Area Council, demanded that Pittsburgh close all ARC facilities. Soon thereafter, on July 18, 1983, Councilman Robinson, along with two other council members, introduced a resolution stating that the Council intended to impose a moratorium on the establishment of group homes in Pittsburgh, funded from whatever source, until such time as a procedure acceptable to both the City and the County for locating such homes was established. The resolution was adopted by the City Council on that same date.

Apparently in partial response to the Council, the Planning Department, on October 25, 1983, recommended in an internal memo that conditional use permit applications for the 1216 Middle Street facility be approved, and that $200,000 in CDBG funds be used to relocate the residents of other ARC facilities outside Pittsburgh. On the same day, the Planning Department officially rec-

ommended approval of the Middle Street facility, but denied approval for the Tripoli and East Ohio Street locations. Later, Frederick Just, a senior planner for the Planning Department, indicated to Charles Cain, director of ARC, that community opposition had been a determinative factor in the Department's decision. On November 21, 1983, in keeping with its moratorium, the City Council, without providing a hearing or offering written reasons, rejected conditional use applications for the Middle Street, Tripoli Street, and East Ohio Street facilities.

After the Council's rejection of its applications, ARC worked with the Planning Department in an attempt to find alternate sites for its Pittsburgh facilities. Because the Planning Department concluded that community opposition had to be considered in selecting alternate sites, the Department rejected several proposals for relocation due to anticipated neighborhood hostility.

As a result of these developments, City and County officials and representatives of ARC met in the fall of 1984 to find a way to allay community fears and to allow ARC to remain in the North Side section. An agreement was reached which was to become effective, at the City's insistence, only with the consent of local community organizations. The agreement provided that (1) ARC would operate only its 800 East Ohio Street facility in the Northside section; (2) ARC would treat only 50 alcoholics in the facility; (3) the City would provide $100,000 and the County would provide $100,000 in the form of CDBG funds for renovations and improvements to the East Ohio Street facility, subject to formal approval by the City Council and County Commissioner; (4) the City Council would appoint one-third of the board members of ARC, and ARC in turn would remove all staff members from its Board while appointing community residents to it; (5) the City and County would monitor ARC's performance and ARC would regularly meet with neighborhood groups; (6) the County would

seek funding so that it could hire a new administrative officer; (7) ARC would treat no persons convicted of driving while under the influence of alcohol at the East Ohio Street facility; and (8) the County would invest an additional $100,000 in CDBG funds to acquire or improve ARC facilities located in Allegheny County. City and County officials reached the agreement after having been given informal authority by their respective administrations to resolve the conflict. The agreement is significant because earlier, in January, 1984, the City had filed suit against ARC in the Allegheny County Court of Common Pleas seeking preliminary and permanent injunctions to close all ARC facilities in Pittsburgh. The action was based on ARC's failure to meet fire and building codes, which ARC maintained could only be corrected with the appropriate zoning approval from the City. After an issuance and vacation of the injunctions, a consent agreement was entered on January 14, 1985, which essentially incorporated the terms of the agreement between ARC and City and County officials. Subsequently, in accordance with the agreement, ARC sought to attain the required zoning approval for the East Ohio Street Center. ARC was unable, however, to obtain the required consent of the East North Side Area Council. Another community organization, the East Allegheny Community Council, later agreed to the proposal, but only upon certain conditions, one being that ARC sell its other properties only when the organization agreed that it could.

Despite its inability to gain the unanimous support of community organizations, ARC continued to seek zoning approval. On February 5, 1985, the Planning Department recommended that ARC's application for the East Ohio Street facility be approved for 55 residents. The Department also recommended that (1) an outside full-time director be hired by the ARC Board within 60 days of approval by the Council; (2) three neighborhood residents be appointed to the ARC Board within 30 days of

Council's approval; (3) funds for remedying Code violations be secured within 90 days of Council's approval; and (4) a site plan to include a privacy fence, landscaping, and a recreation area be submitted to the Planning Department within 30 days of Council's approval. On April 22, 1985, presumably after a Planning Commission hearing, City Council held a five-hour public hearing on the ARC application. Apparently still bound by its moratorium, the Council voted on May 20, 1985 to deny ARC's application on grounds that approval would diminish surrounding property values and hinder orderly community development.

Shortly thereafter, the instant action was filed in the United States District Court for the Western District of Pennsylvania against the City by a class consisting of alcoholics in need of ARC services who could obtain those services nowhere else. ARC's subsequent motion to intervene was granted by the district court on grounds that ARC, as operator of the recovery centers, had an interest in the property and transactions which might be affected by class action plaintiffs' suit. After trial, pursuant to the Equal Protection Clause, 42 U.S.C. § 1983, and 29 U.S.C. § 794, the district court, 620 F. Supp. 935, granted preliminary injunctive relief *pendente lite* which directed (1) the City to grant ARC a conditional use permit for a group care facility at 1216 Middle Street, and a conditional use permit for an institutional facility at 800 East Ohio Street; (2) the City to grant ARC building permits to undertake repairs and renovations at 1216 Middle Street and 800 East Ohio Street to bring those facilities into compliance with relevant codes; (3) the City to grant occupancy permits for these locations without undue delay; (4) the City and County to pay to ARC the sum of $100,000 in CDBG funds for necessary repairs and renovations of both the 1216 Middle Street and 800 East Ohio Street facilities within 90 days; and (5) the City and County to appropriate additional CDBG funds after initial repairs to

finance certain exterior renovations of the 800 East Ohio Street facility so that ARC might provide services to 50 residents at that facility. The City now appeals the district court's grant of injunctive relief. The County does not appeal.

II.

This case requires us to make several inquiries. First, we must determine whether plaintiffs in the action before the district court had standing to bring suit. Second, we must determine whether the district court abused its discretion in failing to abstain from deciding the action before it. Third, we must determine whether this action was barred by the statute of limitations. Fourth, we must determine whether the granting of the injunction under the circumstances of this case violated federal statutory law. And finally, we must determine whether the district court correctly concluded that appellees were entitled to an injunction on the basis of their federal constitutional and statutory claims. We will resolve these issues in the order set forth above.

III.

We first consider the standing of class action plaintiffs in the action before the district court. On appeal, appellants assert for the first time that class action plaintiffs-appellees should be denied injunctive relief because appellees were not directly affected by the City's actions in denying ARC zoning approval. As indirectly affected parties without a property interest in the property denied zoning approval, appellants contend, class-action plaintiffs-appellees lack standing to challenge the City's actions. We are unpersuaded by appellants' argument.

The leading case on the issue of standing is *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In *Warth*, a non-profit corporation desiring to alleviate the housing shortage for low-and-moderate income persons, along with several racial and ethnic minorities, brought suit against a municipality alleging that its

zoning ordinance effectively excluded low- and moderate-income persons from living in the town in contravention of, *inter alia*, the fourteenth amendment and 42 U.S.C. § 1983. In ruling on plaintiffs' claims, the Supreme Court set forth the bifurcated inquiry which must be undertaken by a federal court resolving a standing question. First, a federal court must determine whether a plaintiff has "suffered 'some threatened or actual injury resulting from the putatively illegal action,'" *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973)), by the defendant. Second, if the federal court determines that the plaintiff has suffered such injury, the court must then determine whether non-constitutional, prudential limitations dictate that the court not exercise jurisdiction. Prudential limitations would so dictate where a plaintiff merely alleges a generalized grievance shared by a large class of citizens or where a plaintiff asserts the rights or interests of a third party. *Id.*

Here, class action plaintiffs-appellees' claims satisfy both *Warth* requirements. Since appellees contend in their pleadings that they will not receive treatment if an ARC facility is not kept open, *see* App. at 7a-10a, they have "allege[d] specific, concrete facts demonstrating that the challenged practices harm [them] and that [they] personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508, 95 S.Ct. at 2210. Additionally, because class action plaintiffs-appellees are the intended recipients of ARC's services, they, like plaintiffs in federal cases the *Warth* Court cited approvingly have "challenged zoning restrictions as applied to particular projects that would supply housing within their means, and *of which they* [are] *intended residents.*" [4] *Id.* at 507, 95 S.Ct. 2209 (emphasis added).

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[4] *See e.g., Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) (individual plaintiffs who would be able to reside in proposed subsidized housing have standing to challenge

Moreover, prudential limitations are inapplicable to class action plaintiffs-appellees' claims since appellees allege harm to themselves from lack of treatment as opposed to a generalized harm to a society from lack of treatment centers for alcoholics. And clearly, class action plaintiffs-appellees assert their own rights (both under the Equal Protection Clause and under the Rehabilitation Act of 1973) rather than the rights of a third party. We therefore hold that appellees had standing to bring this suit before the district court.

IV.

We next consider the district court's decision not to abstain from passing on class action plaintiffs-appellees' claims. Appellants contend that *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny required abstention in this case. Appellants base their contention primarily on *Ohio Civil Rights Commission v. Dayton Christian Schools*, —— U.S. ——, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986). In *Dayton Christian Schools*, a private, non-profit religious educational institution (Dayton Christian Schools, Inc.) required its teachers to subscribe to a particular set of religious beliefs, including belief in the internal resolution of disputes. As a condition of employment, teachers were required to present any employment-related grievance to their immediate supervisors and to acquiesce in the final decision of Dayton's board of directors rather than to pursue a civil remedy in court. After a pregnant teacher was told her employment contract would not be renewed due to the school's religious doctrine that mothers should stay home with their preschool children, she contacted an attorney, who threatened Dayton with state and federal litigation. Dayton then rescinded its nonrenewal decision,

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zoning practices preventing its construction): *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (potential tenant may maintain action challenging zoning decisions affecting proposed housing project).

but terminated the teacher for violation of the internal dispute resolution agreement. The teacher then filed an action with the Ohio Civil Rights Commission, alleging that her termination violated Ohio sex discrimination statutes. Ultimately, the Commission initiated internal administrative proceedings against Dayton, which answered the complaint by asserting that the Commission's exercise of jurisdiction over the matter would violate the first amendment. While the administrative proceedings were pending, Dayton and others filed a federal action seeking an injunction against the state administrative proceedings.

After rulings by federal district and circuit courts, the Supreme Court held that the district court should have abstained. The Court held that *Younger* concerns are applicable to state administrative proceedings as well as state criminal proceedings and that so long as a state plaintiff has a full and fair opportunity to litigate his federal claims at some point in the state proceedings, abstention is appropriate. *Dayton*, 106 S.Ct. at 2722-24. Accordingly, since Dayton could raise its constitutional claims before a state court reviewing the Commission's findings, as well as possibly before the Commission itself, the Court held that the district court should have abstained. *Id.*

Appellants maintain that *Dayton Christian Schools* requires abstention in this case. Here, as in *Dayton Christian Schools*, a state administrative hearing is implicated. As in *Dayton Christian Schools*, it appears that the state plaintiff (ARC) may ultimately present its constitutional claims in the state administrative proceedings.[5] Several facts, however, distinguish this case from typical cases in which abstention is appropriate, and these facts make *Dayton Christian Schools* and *Younger* inapplicable.

First, the federal plaintiffs in this suit (a class consisting of recovering alcoholics who seek and have re-

[5] Brief of Class Action Plaintiffs-Appellees at 26.

ceived treatment at ARC) are not the defendants in, nor even parties to, the relevant state administrative proceeding. ARC alone brought the state action, when it sought a conditional use permit and then appealed. As the Supreme Court made clear in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), where the plaintiff in a federal action is not a party to the state proceeding, *Younger* concerns about federal adjudication do not arise. In *Doran*, three corporations, each of which operated a bar in a town with an ordinance prohibiting topless dancing, brought an action in federal court challenging the ordinance. One of the three corporations also violated the ordinance during the pendency of the action and was charged in a criminal proceeding. On review, the Supreme Court allowed relief for the two uncharged federal plaintiffs on grounds that because there were no state proceedings pending against them, *Younger* concerns about questions of federalism, comity, or state competence to adjudicate federal claims were not implicated. *Doran*, 422 U.S. at 930, 95 S.Ct. at 2567. Here, as in *Doran*, the federal plaintiff is not a party to an ongoing state proceeding. Since adjudication of the merits of class action plaintiffs-appellees' federal claims in this case creates no presumption of state adjudicative inadequacy with respect to ARC's zoning hearing and appeal, *Younger* and *Dayton Christian Schools* are simply inapplicable.

It may be contended that the federal plaintiffs and state plaintiff in this suit, though legally distinct, are so closely related that a federal action by one should not be permitted while the other seeks redress of the operative wrong in a state proceeding. In fact, the Supreme Court in *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), held that parties who are too closely related should be treated as one party for *Younger* purposes. Upon analysis, however, the contention that *Hicks* controls in this case must be rejected. Federal class action plaintiffs-appellees and state plaintiff ARC are not sufficiently related to justify unitary treatment. This Court in

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Educ., 654 F.2d 868 (3d Cir.1981), held that unitary treatment under *Younger* is limited to "an employer's federal suit when its employees assert identical interests in state court", *id.* at 878, and to cases in which federal plaintiffs are closely related to "state defendants 'in terms of ownership, control and management.'" *Id.* (quoting *Doran v. Salem Inn*, 422 U.S. at 929, 95 S.Ct. at 2566.) This Court specifically interpreted *Doran* as requiring unitary treatment under *Younger* only where there exists "an identity of economic activities and interests." *Id.* Class action plaintiffs-appellees and ARC plainly lack the requisite identity of activities and interests. Class action plaintiffs-appellees have no proprietary interest in ARC, and ARC does not employ appellees. *Cf. Hicks*, 422 U.S. at 348, 95 S.Ct. at 2291 (federal plaintiff employed state defendant and federal plaintiff's federal claim was intertwined with state defendant's right).

Moreover, the conclusion that class action plaintiffs-appellees have interests which are distinct for purposes of *Younger* from those of intervenor ARC is supported by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In *Roe*, two prosecutions under the Texas abortion law challenged by class action plaintiff-appellant were pending against Dr. James Hallford, who had intervened in the district court action. Hallford argued to the Supreme Court that he was entitled to intervene in the class action under *Younger* as "a 'potential future defendant'", *id.* at 126, 93 S.Ct. at 713, despite the pending state prosecutions. After consideration, the Court rejected Hallford's argument and cited *Younger*. *Id.* at 126-27, 93 S.Ct. at 713-14. The Court, then, however, proceeded to adjudicate the class action plaintiff-appellant's claim *on the merits*, despite the fact that the grant of declaratory or injunctive relief to class action plaintiffs-appellants would have, as a practical matter, ended the state prose-

cution against Hallford under the very same statute. In so doing, the Court recognized that in the treatment context, *Younger* identity is not easily inferred and that patients and those who treat them have distinct interests [6] in state action which affects the possibility of treatment.[7] *See* Fiss, *Dombrowski*, 86 Yale L.J. 1103, 1130-31 (1977).

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[6] *See also Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C.Cir. 1984) (abstention inappropriate where federal plaintiff not party to any pending state suit and state suit questionable vehicle for pressing federal claims). *Women's Community Health Center of Beaumont v. Texas Health Facilities Comm'n*, 685 F.2d 974 (5th Cir. 1982), is not to the contrary. That case upheld a district court's abstention where physicians and patients of a particular health center sought an injunction against Texas's enforcement of certain provisions of its Health Planning Act. Abstention was there arguably warranted because the state's actions with respect to only one center at one time were challenged, and the entire controversy could be adjudicated in state court. *Id.* at 982. In this case, abstention is not warranted, in part because state action over a period of time affecting more than one treatment unit may be challenged in the federal proceeding but not in the state proceeding. *See infra* p. 179. Further, to the extent that *Women's Community Health Center* is inconsistent with *Roe v. Wade*, the former is invalid.

[7] It cannot be contended that because federal class action plaintiffs-appellees could have permissibly intervened in the state proceeding involving federal intervenor ARC, federal plaintiffs-appellees possess interests which are sufficiently analogous to federal intervenor's to justify abstention. Although it appears that plaintiffs-appellees could have intervened in the state proceeding, *see* 53 Pa. Stat.Ann. § 11009 (Purdon 1974), *Younger* has yet to be interpreted by the Supreme Court to require both abstention by a federal court and intervention by a potential private state litigant. *New Jersey-Philadelphia Presbytery Church v. New Jersey State Bd. of Higher Educ.*, 654 F.2d at 882. Further, a rule that permits a conclusion of identity of interest for *Younger* purposes from the mere possibility of permissive intervention in state proceedings allows a state litigant to dictate choice of forum for all potential intervenors based solely on a limited common interest, without regard to identity, economic control, preferred litigation strategy and ultimate litigation goals. More fundamentally, a rule that considers the possibility of permissive state intervention disposi-

Abstention in this case would also have been improper because federal plaintiffs would have been unable to request in the state proceeding all relief available in federal court. Under Pennsylvania law, the sole state method for contesting the validity or constitutionality of a zoning ordinance or the application thereof is the filing of an appeal with the board of adjustment (with possible subsequent judicial review) or directly with the court of common pleas, if appropriate. *Appeal of Bradley*, 58 Delaware County Ct. 119 (1970). To be effective, the appeal must be filed within 30 days of the relevant administrative action. 42 Pa.Cons.Stat.Ann. § 5571 (Purdon 1981). Here, federal relief was available for the City's alleged November 21, 1983 violation of the Equal Protection and Due Process Clauses.[8] The City's November 21, 1983 actions could not, however, have been attacked in any state zoning proceeding since, by the filing of the federal complaint, the state statute of limitations had lapsed. In light of class action plaintiffs-appellees' inability to litigate this claim, we cannot conclude that the state proceeding could have afforded complete relief.[9]

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tive of identity for *Younger* purposes ignores the most significant issue that a federal court asked to abstain must address, namely, whether "the party to the federal case may fully litigate his claim before the state court." *Hicks*, 422 U.S. at 349, 95 S.Ct. at 2292.

The Court's actions in *Roe* might indicate that the district court should have denied ARC's motion to intervene in the federal proceeding. Because the district court granted available injunctive relief on class action plaintiffs-appellees' claims, and thus ARC's intervention had no practical consequence, we do not consider the propriety of the district court's action in allowing ARC to intervene.

[8] As is noted infra pp. 179-80, the relevant statute of limitations on the federal claims is two years.

[9] Since appeal of the City's November 21, 1983 decision was absolutely barred at the filing of the federal class action plaintiffs' suit, we need not consider whether it would be procedurally possible for the Allegheny County Court of Common Pleas to consider both the November 21, 1983 decision and the May 20, 1985 decision

Younger and *Dayton Christian Schools* are inapplicable for a third reason. Since *Younger*, the Court has recognized that extraordinary circumstances may threaten irreparable injury which justifies federal intervention in ongoing state proceedings even in the absence of bad faith or harassment by state officials. *Younger*, 401 U.S. at 53, 91 S.Ct. at 755. Although the Court has acknowledged that the nature of the term "irreparable harm" makes it difficult to define every situation the term encompasses, *see Trainor v. Hernandez*, 431 U.S. 434, 442 n. 7, 97 S.Ct. 1911, 1917 n. 7, 52 L.Ed.2d 486 (1977), the Court has stated that circumstances are extraordinary in the relevant *Younger* sense where they create "an extraordinarily pressing need for immediate federal equitable relief," *Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530-31, 44 L.Ed.2d 15 (1975), and do not simply present a unique or unusual factual situation. *Id.* at 125, 95 S.Ct. at 1531. Such need for relief appears justified upon a showing " 'that an injunction is necessary in order to afford adequate protection of constitutional rights.' " *Wooley v. Maynard*, 430 U.S. 705, 712, 97 S.Ct. 1428, 1434, 51 L.Ed.2d 752 (1977) (quoting *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322 (1935)).

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in the same zoning appeal. Temporal considerations aside, we find it sufficient to note that separate zoning appeals may be properly consolidated only where the causes of action involved in each appeal are so related that the determination of one cause is a virtual determination of the other. 1 Goodrich-Amram 2d § 213(a):1 at 164-65 n. 98 (1976); *Mosside Assoc. Ltd. v. Zoning Hearing Bd. of the Municipality of Monroeville*, 70 Pa.Commw. 555, 558-59, 454 A.2d 199, 201 (1982). Here, the distinct factual predicates underlying the November 21, 1983 and May 20, 1985 decisions would appear to preclude the possibility that one adjudication would determine the other. For the reasons set forth above, we also do not consider whether class action plaintiffs-appellees could raise their Rehabilitation Act of 1973 claim in a state zoning proceeding which, even in its appellate stages, appears limited to zoning decisions affecting zoned property.

Here, appellees have made such a showing. As the evidence indicated, and the district court reasonably found, class action plaintiffs-appellees are primarily recovering alcoholics who are in a critical state of their recovery. Finding of Fact ("FF") 82. Without proper care, supervision and peer support each could easily suffer a relapse. *Id.* For these alcoholics, a relapse threatens not only a potentially irremediable reversion to chronic alcohol abuse but immediate physical harm or death. The record reflected that alcoholics who had been denied treatment at the Center were unable to end their alcohol abuse and suffered severe injury or death as a result. App. at 287a, and it is clear that ARC provides the only treatment available for appellees. FF 80, 82. It was therefore not a clear error for the district court to conclude that if recovering alcoholics at the Center were improperly forced from the center and into a community which cannot provide treatment for their abuse, these alcoholics too might suffer as earlier untreated alcoholics in the North Side section have. We believe that the threat of this type of injury is precisely what the irreparable harm exception to *Younger* is intended to prevent. Indeed, it is difficult to conceive of many facts which would more compellingly argue for appellees' relief. A wrongful deprivation by the City of Pittsburgh in this case would threaten not only to do harm to appellees' present enjoyment of rights to Equal Protection, Due Process and equal treatment under the Rehabilitation Act of 1973, but to eliminate the possibility of appellees' enjoyment or exercise of any federal constitutional or statutory rights in the future. In light of this, we cannot conclude that the district court should have abstained to accommodate attenuated comity and federalism interests.

V.

We next consider appellants' statute of limitations defense. In *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that the

statute of limitations for purposes of § 1983 civil rights actions is the statute of limitations for the relevant state's personal injury statute.[10] The appropriate limitation period for § 1983 claims brought in Pennsylvania is the two-year limitation period provided by 42 Pa.Cons.Stat. Ann. § 5524. *Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir.1985).[11] Since class action plaintiffs-appellees filed their complaint May 22, 1985, their action was clearly timely as to both City Council's November 21, 1983 and May 20, 1985 zoning application rejections. We therefore hold that the appropriate statute of limitations poses no bar to the claims in this suit.

VI.

We next consider appellants' federal statutory claims. Appellants assert that the district court violated the Full Faith and Credit Act, 28 U.S.C. § 1738 (1982), by issuing an injunction which was inconsistent with a January 14, 1985 consent decree of the Allegheny County

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[10] Although the district court in the underlying action did not award damages, relief was granted pursuant to 42 U.S.C. § 1983, which authorizes federal courts to afford injunctive as well as retroactive relief. *See Taylor v. City of Knoxville*, 566 F.Supp. 925 (E.D.Tenn. 1982). Accordingly, *Wilson* is applicable to appellant's statute of limitations defense.

[11] We must reject appellant's assertion that the proper statute of limitations in this case is the 30-day period provided for appeals of administrative decisions by 42 Pa.Cons.Stat.Ann. § 5571 (Purdon 1981). Such an assertion flies in the face both of *Wilson* and *Smith*, neither of which suggests that a zoning decision should be afforded special statute of limitations protection. Indeed, the creation of such an exception would diminish the uniformity of statute of limitations periods that *Wilson* sought to achieve. *See Wilson*, 105 S.Ct. at 1944. Adoption of appellants' suggestion would also have the undesirable effect of forcing adversely affected parties to zoning proceedings to file federal suit within 30 days of an initial zoning decision, thus virtually eliminating cases in which successful zoning appeals obviated the need for any federal litigation.

Court of Common Pleas. That consent decree, entered into between ARC and the City, ordered ARC (1) to cease occupancy of any of its facilities in Pittsburgh other than the 800 East Ohio Street facility within 90 days of January 14; (2) ARC to cease occupancy of its 800 East Ohio Street facility within 90 days of January 14 if ARC had not acquired necessary use and occupancy permits and to resume occupancy only upon acquisition of those permits, and (3) to cease admission of persons into its Pittsburgh facilities and programs. Appellants contend that since the district court's decision in the instant litigation permits ARC to continue to occupy its 800 East Ohio Street facility without proper permits and to occupy its 1216 Middle Street facility at all, the district court failed to accord the judgment of the Court of Common Pleas full faith and credit.

Section 1738 requires federal courts to give a state court judgment preclusive effect to the same extent the courts of the rendering state would. *Davis v. United States Steel Supply*, 688 F.2d 166, 170 (3d Cir.1982), *cert. denied*, 460 U.S. 1014, 103 S.Ct. 1256, 75 L.Ed.2d 484 (1983). To fulfill their § 1738 obligation, federal courts must look to relevant state (here Pennsylvania) res judicata and estoppel law in determining the effect of state court judgments. *Id.* In Pennsylvania, a consent decree is a judgment only as to matters actually litigated and cannot preclude claims which were not raised before and resolved by the approving court. *See Keystone Building Corp. v. Lincoln Savings and Loan*, 468 Pa. 85, 360 A.2d 191 (1976); *In Re: Jones & Laughlin*, 328 Pa. Super. 442, 477 A.2d 527 (1984). Further, under Pennsylvania law, a consent decree is an agreement only between parties and does not bind or preclude the claims of non-parties. *Sabatine v. Commonwealth*, 497 Pa. 453, 442 A.2d 210 (1981). Pennsylvania law thus makes clear that the district court did not fail to accord full faith and credit to the Allegheny County Court judgment in issuing its own injunction. First, the constitutional and

federal statutory claims on which the district court based the injunction were not raised before the Common Pleas court that approved the consent decree. Indeed, ARC was not permitted by state law to raise those claims in that proceeding. Conclusion of Law ("CL") 31. ARC was therefore not afforded the full and fair opportunity to litigate those claims, which is a prerequisite for preclusive effect under Pennsylvania law. *Safeguard Mut. Ins. Co. v. Williams*, 463 Pa. 567, 345 A.2d 664 (1975). Second, although ARC was a party to the consent decree, class action plaintiffs in the suit before the district court were not. Thus, whatever effect the consent decree might have upon claims of ARC, the decree cannot preclude claims made by those actually receiving treatment in the Center. Since the district court's injunction related to claims of parties not considered by the Allegheny Court of Common Pleas in its consent decree, we find the injunction consistent with § 1738.

VII.

Finally, we turn to the question of the propriety of the district court's grant of preliminary injunctive relief. To grant a preliminary injunction, a trial court must conclude that:

> (1) plaintiffs are likely to succeed on the merits;
>
> (2) plaintiffs are subject to irreparable harm *pendente lite*;
>
> (3) defendants will not suffer substantial harm from the grant of an injunction; and
>
> (4) the public interest requires that plaintiffs be accorded relief.

Constructors Ass'n. of Western Pa. v. Kreps, 573 F.2d 811, 815 (3d Cir.1978). Once a preliminary injunction has been granted, an appellate court may rescind the grant only where it is shown that "the trial court abuse[d

its] discretion, commit[ted] an obvious error in applying the law, or ma[de] a serious mistake in considering the proof." *A.O. Smith Corp. v. F.T.C.*, 530 F.2d 515, 525 (3d Cir.1976). We must therefore review the district court's grant of injunctive relief on both class action plaintiffs-appellees' statutory and constitutional claims, considering each element of each claim under these standards.

A. Section 504 of the Rehabilitation Act of 1973

i. Likelihood of Success on The Merits

The district court concluded that class action plaintiffs-appellees were likely to succeed on their claim under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. In order to prevail properly on that claim, appellees were required to make a *prima facie* case by demonstrating that

> (1) they were handicapped individuals under the Act;
>
> (2) they were otherwise qualified for the program of benefits from which they had been excluded;
>
> (3) they have been excluded solely because of these handicaps; and
>
> (4) the program from which they have been excluded is subject to § 504.

Strathie v. Dept. of Transp., 716 F.2d 227, 230 (3d Cir. 1983). If defendants then failed to show that their actions were substantially justified—not merely reasonable —appellees were entitled to judgment. *Id.* at 233.

We cannot conclude that the district court erred in finding that class action plaintiffs-appellees are likely to prevail on the first prong of the *Strathie* test. As the record shows, appellees demonstrated that they suffered

from varying degrees of alcoholism. FF 77. Case law establishes that alcoholics are handicapped within the meaning of § 504. *Davis v. Bucher*, 451 F.Supp. 791, 797 n. 4 (E.D.Pa.1978); *see McKelvey v. Walters*, 596 F.Supp. 1317, 1323 (D.D.C.1984).[12] We also cannot conclude that the district court erred in finding that class action plaintiffs-appellees are likely to prevail on the second prong of the *Strathie* test. For purposes of § 504, an "otherwise qualified handicapped individual" is a handicapped person who is able to meet all requirements for receipt of benefits of a federally-funded program or activity despite his or her handicap. *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979); *Traynor v. Walters*, 606 F.Supp. 391, 400 (S.D.N.Y.1985). It is undisputed that appellees are and were eligible to receive funds from the federal CDBG program at issue despite any handicap. Indeed, the City implicitly recognized their eligibility when it offered in 1985 to provide $100,000 in CDBG funds for renovation of 800 East Ohio Street and when the City's Planning Department recommended in 1982

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[12] We must reject the City's assertion that it did not violate § 504 because it denied CDBG funds to intervenor ARC which is not a "qualified handicapped individual" under the Act. *See* Brief of Appellant at 24. Section 504's protection extends not just to handicapped individuals who are direct participants in federally-funded programs or activities but also to those who are intended ultimate beneficiaries of such programs or activities. Under § 504, discrimination on the basis of handicap is actionable upon a simple showing that discrimination has resulted in "a diminution of the benefits [a handicapped individual] would otherwise receive from [a federally-funded] program." *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1232 (7th Cir. 1980). In fact, the clear intent of Congress in enacting § 504 was to make unlawful direct or indirect discrimination against any handicapped individual who would benefit from a federally-funded program or activity. *NAACP v. Wilmington Medical Center, Inc.*, 453 F.Supp. 330, 339 & n. 34 (D.Del. 1978). Therefore, if the City denied CDBG funds to ARC because the funds would be used for handicapped individuals, it violated § 504.

that $75,000 to $100,000 in CDBG funds be provided for renovation of certain of ARC's properties.

The district court also did not err when it concluded that class action plaintiffs-appellees are likely to prevail on the third prong of the *Strathie* test, which requires that Pittsburgh have denied funding based on the relevant handicap. The record more than adequately supports a conclusion that the City was motivated by the handicapped status of class action plaintiffs-appellees when it denied the relevant conditional use permit applications. As the evidence showed, the Planning Department rejected proposed relocations by ARC (which would have resulted in funding) based only on community hostility towards alcoholics. FF 37. In fact, the Department did so after actually recommending federal funding of ARC before community opposition to alcoholic treatment centers began to mount. Further, the City acknowledged through the Planning Department that the level of community opposition to the alcoholism of ARC's residents was a factor the City considered determinative in its decision concerning site selection for ARC. *Id.* Finally, Pittsburgh denied zoning approval for ARC after the East North Side Council refused to give its approval to the zoning, and the City later offered reasons for its actions that were unsupported by fact. CL 8-12. In light of the fact that appellees were otherwise eligible for the funding they were denied, and particularly in light of the City's constant emphasis on the handicap of ARC's residents, we cannot say that the district court's conclusion concerning the reason for appellees' exclusion was in error. Finally, the district court's conclusion that the fourth prong of *Strathie* is likely to be satisfied was also not clearly wrong. As the district court correctly found, § 504's protection extends to any federal program or activity, *Traynor*, 606 F.Supp. at 399, including the federal CDBG program which would have provided funding to appellees but for appellants' discrimination.

In response, appellants offered the district court no substantive justification for their actions in denying CDBG funding as required by *Strathie*. As the evidence demonstrated and the district court found, the City's argument that it was attempting to preserve property values, to structure community development, and to ensure compliance with building codes had no rational basis since the only evidence adduced indicated that the continued operation of ARC would have had no negative effect on property values, ARC was already located in the community and thus could not affect development, and compliance with building codes was unnecessary for zoning approval. CL 12-16. Further, the City's arguments, even if valid, would legitimate only its denial of zoning permits, not its denial of federal CDBG funds.

Since class action plaintiffs-appellees showed a likelihood of success on each prong of the *Strathie* test, and the City failed to sustain its burden of rebuttal, we must conclude that the district court did not err in finding appellees showed the requisite likelihood of success on their Rehabilitation Act claim.

ii. Irreparable Harm to Plaintiff

The district court's finding that class action plaintiffs-appellees were subject to irreparable harm during litigation of their Rehabilitation Act claim was, we believe, not a clear error. The district court concluded that continued operation of the Center was necessary to prevent imminent harm to recovering appellees, and that relief that guaranteed the issuance of the required zoning permits and release of federal funds needed to comply with building and fire codes was necessary to assure continued operation, FF 97, CL 28; that conclusion was amply supported. Extensive testimony and evidence established the harm to which alcoholics in the North Side Section were exposed and the actual harm (e.g., relapse and suicide) some suffered without treatment. App. at 287a. Evidence

also established that appellees could find treatment only at ARC centers. FF 80, 82. Since the evidence strongly suggested that at least some appellees would be seriously injured if ARC were closed, we cannot say the court clearly erred in determining that release of the CDBG funds pursuant to § 504 was necessary to prevent harm to class action plaintiffs-appellees.

iii. Harm to Defendant from Grant

Similarly, we cannot say the district court erred in determining the City would not suffer substantial harm by release of the CDBG funds. The evidence before the district court on the issue was clear. The funds to be released were exclusively federal and had previously been designated for ARC. FF 26, 27. As a result of the court's actions, the City fisc was entirely unaffected. Since the City cited no potential source of harm to itself from the injunction other than loss of revenues, the district court properly concluded the injunction imposed no hardship.

iv. The Public Interest

Finally, the district court did not err in concluding that the public interest was furthered by the issuance of the injunction. The potential harm posed to recovering appellees, as well as the surrounding community by the cessation of treatment, was extremely high. FF 82-85. The benefits ARC provides the East North Side section by treating alcoholics and reducing the burden imposed on area police and fire departments is correspondingly great. As the district court reasonably determined, these considerations outweigh any welfare concerns about temporary occupation of structures which may not comply with building codes.

Since each element necessary for the grant of preliminary injunctive relief under *Constructors Ass'n* was satisfied in connection with class action plaintiffs-appellees'

Rehabilitation Act claim, we find that the district did not err in ordering injunctive relief with respect to that claim.

B. Equal Protection

i. Likelihood of Success on the Merits

The district court also concluded that class action plaintiffs-appellees were likely to prevail on their Equal Protection claim. To have properly gained a preliminary injunction, class action plaintiffs-appellees must have demonstrated the likelihood that the instant application of Pittsburgh Code of Ordinances § 933.01 had no rational basis and thus violated the fourteenth amendment.[13]

The controlling case on class action plaintiffs-appellee's Equal Protection claim appears quite clearly to be *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).[14] In *Cleburne*, a

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[13] Since we conclude that the City's action was without rational basis, *see infra*, pp. 184-85, we do not consider whether alcoholics constitute a suspect class for purposes of the Fourteenth Amendment. *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (rejecting claim that mentally retarded persons constitute a suspect class but sustaining claim that City's zoning decision violated Equal Protection Clause).

[14] The City's assertion that *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir. 1984), precluded the action before the district court is incorrect. *Cohen* held that a police officer who showed that his termination and the denial of his request for back pay upon reinstatement violated Pennsylvania law did not establish a violation of procedural due process under the United States Constitution because the state court system afforded him a prompt opportunity to correct the error in a subsequent state proceeding. *Cohen* thus established that Pennsylvania's procedure for disposition of such claims was not constitutionally deficient, at least in this Circuit's view, and thus could not serve as a basis for a claim under 42 U.S.C. § 1983 (1982). Class action plaintiffs-appellees' claims, however, differ greatly from the police officer's in *Cohen*. Here, appellees assert that the City irrationally applied its Zoning Code—whether or not that Code satisfies federal procedural due process requirements—in violation of the fourteenth amendment to the

municipality enforced an ordinance which required only certain group homes (including homes for the retarded and alcoholics) to apply for a special use zoning permit which could be granted only by the City Council. In accordance with the ordinance, Cleburne Living Center, a group home for the retarded, applied for a special use permit. After a public hearing, Cleburne Living Center was denied a special use permit to house 13 mentally retarded patients. The record in *Cleburne* showed that the Council's decision was based at least in part on the negative attitude of the majority of property owners near the proposed site for the Center. *Id.* 105 S.Ct. at 3259. The record also showed that the Council's additional objections that the home would be located near a junior high school, would be situated on a flood plain, and would house too many patients were pretextual since retarded students already attended the junior high school, fear of flooding would not have prevented the location of a home for convalescents at the site even though convalescents might be less able than retarded persons to save themselves from a flood, and the City had failed to show why thirteen non-retarded persons could live together safely while thirteen retarded persons could not. On these facts, the Court in *Cleburne* sustained the Center's claim that the ordinance as applied violated the Equal Protection Clause of the fourteenth amendment. *Id.* 105 S.Ct. at 3260.

Here, the class action plaintiffs-appellees have made a similar showing. Appellees showed that the City's alleged concern about a drop in property values was irra-

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Constitution. App. at 11a. Thus, appellees' claims, unlike the plaintiff's in *Cohen*, turn on whether the City acted without rational basis in *applying* a Code, rather than whether the City or State of Pennsylvania afforded citizens insufficient procedural protection in *enacting* Codes or statutes. Consequently, *Cohen* bars neither appellees' federal Constitutional claims nor their claims under 42 U.S.C. § 1983.

tional since ARC had operated in the neighborhood for some years and adduced evidence indicating that property values would not be adversely affected by the Center's presence. FF 63. Appellees also established that the City's alleged concern with orderly development was irrational since ARC was already located in the North Side Section. FF 64. Additionally, appellees demonstrated that ARC facilities met lot size and other zoning requirements and that the City's alleged concerns about density were addressed by density ordinances with which ARC had complied. And finally, here as in *Cleburne*, appellees demonstrated that the City took its essentially unjustified action in an atmosphere charged with hostility towards a minority group. FF 37-38. These proofs, and their lack of contradiction by the City, lead us to conclude that, in light of *Cleburne*, class action plaintiffs-appellees are likely to prevail on the merits of their Equal Protection claim.

ii. Irreparable Harm to Plaintiff

The district court also did not clearly err in concluding that class action plaintiffs-appellees are subject to irreparable harm during litigation of their Equal Protection Claim. The evidence demonstrated that cessation of treatment threatened recovering appellees with imminent physical and psychological harm. FF 82. As when it considered appellees' federal statutory claim, the district court did not clearly err in finding that the grant of relief on the constitutional claim was necessary to ensure the continued operation needed to prevent irreparable harm to appellees.

iii. Harm to Defendant from Grant

Similarly, we again conclude that the district court did not clearly err in finding that Pittsburgh would not be substantially harmed by the grant of injunctive relief on

the constitutional claim. That relief required the City only to issue the conditional use permit to which intervenor ARC was entitled, and such other permits which the use of properly released CDBG funds would later entitle them. Since the injunction caused the City no financial or other harm, the district court could have properly concluded that the injunction imposed no hardship.

iv. The Public Interest

Finally, we find that the district court did not clearly err in concluding that injunctive relief on the Equal Protection claim was in the public interest. Again, injunctive relief guaranteed benefits in averted physical harm and limited police and fire protection which exceeded the costs of occupation of incompletely approved structures.

Since class action plaintiffs-appellees appear to have satisfied their *Constructors Ass'n* burden with respect to each element of their Equal Protection claim, we conclude that the district court did not err in granting relief on that claim.

VIII.

For the foregoing reasons, we will affirm the district court's grant of injunctive relief.

HUNTER, Circuit Judge, concurring:

If I were writing on a blank slate, I would hold that the district court erred in failing to abstain in this case. In my view, a federal court unduly interferes with state judicial proceedings when the federal court issues an injunction nullifying a state administrative decision that is under review in state court. The pending parallel state proceeding and this case involve the exact same legal issues, the exact same facts, and the exact same parcels of real property—under these circumstances, we disserve

the federal system by appropriating the resolution of the dispute which is properly in the state system. My views are well expressed by the dissenting opinion of Judge Rosenn in *New Jersey—Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 895-908 (3d Cir. 1981). I am, however, bound to follow the majority opinion in that case. Because that opinion is apparently controlling here, I concur in the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. PENNSYLVANIA

Civ. A. No. 85-1228

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSEWEIR, HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK and JOHN KING, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

THE CITY OF PITTSBURGH, PENNSYLVANIA, PAUL J. IMHOFF, Superintendent of the Pittsburgh Bureau of Building Inspections, and ROBERT H. LURCOTT, Director of the Pittsburgh Department of City Planning,

Defendants.

Sept. 23, 1985

Donald Driscoll, Lee Markovitz, Pittsburgh, Pa., for plaintiffs.

D.R. Pellegrini, Pittsburgh, Pa., for defendants.

ZIEGLER, District Judge.

This is a civil action for declaratory and injunctive relief filed by members of a class of former and recovering alcoholics against the City of Pittsburgh for alleged deprivation of their Fourteenth Amendment rights to equal protection and due process. Plaintiffs are residents of a well-known alcoholic treatment program in the City

of Pittsburgh, Pennsylvania, known as The Alcohol Recovery Center (ARC). ARC has provided treatment and shelter to over 20,000 homeless alcoholics for over 19 years at various locations in the Northside section of the City of Pittsburgh. The City has never required a conditional use or occupancy permit.

On July 18, 1983, City Council voted to declare a moratorium on the establishment of group homes within the City following a dispute with the County of Allegheny over the location of such homes. Thereafter, Council voted to deny conditional use approval for continued operation of the ARC program at 1216 Middle Street and 800-820 East Ohio Street. On May 20, 1985, Council rejected the application of ARC to continue operation at a single facility due to community opposition. Plaintiffs filed the instant action contending that the amendment to the City of Pittsburgh Code (Zoning Code) is, in part, unconstitutional on its face, and violative of the Equal Protection Clause and Rehabilitation Act of 1973, as applied. We hold that the Zoning Code as drafted passes constitutional muster but that the decision of the Council of the City of Pittsburgh to deny the application of ARC for a conditional use violated the constitutional rights of plaintiffs to equal protection of the laws because the decision was not rationally related to any legitimate governmental interest. Plaintiffs have sustained their burden of proof with respect to preliminary injunctive relief and the findings that follow are based on the weight of the credible evidence.

I. *Findings of Fact*

(1) The Alcohol Recovery Center (ARC) is a nonprofit corporation which has provided residential treatment to over 20,000 recovering alcoholics in the Northside section of Pittsburgh since 1966.

(2) The Northside facilities have been located at 422-424 Tripoli Street, 1216 Middle Street and 800, 814, 816,

818 and 820 E. Ohio Street in Pittsburgh. ARC also operates facilities at 1831 Hulton Road, Verona, Pennsylvania and R.D. I, Avella, Pennsylvania.

(3) At present, ARC operates at 800 E. Ohio Street in the City, and the Verona and Avella facilities in the County, with 27, 60 and 19 residents respectively.

(4) The Zoning Code of the City provides that group homes are "conditional uses" which require: (1) an application which is processed by the Planning Department; (2) a public hearing before the Planning Commission which issues a recomendation and (3) approval by the Pittsburgh City Council.

(5) ARC submitted applications to the City of Pittsburgh for conditional use and/or occupancy permits for the Northside facilities on four occasions between 1966 and 1977.

(6) The Council of the City of Pittsburgh never acted upon these applications. The applications submitted in 1977 were processed by the Pittsburgh Planning Commission and recommended for approval.

(7) On March 23, 1977, the City of Pittsburgh through the Mayor, Richard S. Caliguiri, sent a letter to ARC commending it for the work that it was performing.

(8) On September 15, 1980, Title Nine of the Zoning Code was amended by ordinance to provide regulations for conditional use exceptions and to create three categories of group homes based on the number of residents.

(9) The ordinance provides that group homes shall include "group residence" facilities where a maximum of seven clients or nine persons overall, including staff, may reside; "group care" facilities, where a maximum of 17 clients or 19 persons overall may reside; and "institutional" facilities where the number of clients and staff exceeds 19.

(10) "Group homes" are defined as facilities which provide specialized health, social or rehabilitative services to the clients and 24 hour supervision.

(11) The group home ordinance of September 15, 1980 prohibited occupancy in a group residence facility by persons 19 years or older who are serving a sentence for a criminal offense.

(12) The group home ordinance was amended on November 7, 1983 to prohibit occupancy in a group care facility by persons 19 years or older who are serving a sentence for a criminal offense, or under arrest and charged with a felony or any violent crime.

(13) There is no prohibition in the ordinance for occupancy in an institutional facility by persons serving a sentence for a criminal offense or under arrest and charged with a felony or any violent crime.

(14) A building permit, issued by the Bureau of Building Inspections of the City, is required before new construction or substantial repairs or improvements (including electrical work) can be performed on any building in Pittsburgh, including group homes.

(15) If repairs are undertaken without a building permit, the owner and workmen may be subject to criminal prosecution and the workmen may have their registrations revoked.

(16) On several occasions since 1980, ARC sought building permits to undertake repairs and improvements. The permits were denied.

(17) Before a building permit can be issued, zoning approval must be obtained. A group home must secure a conditional use approved by the Council of defendant.

(18) In 1982, ARC applied for conditional use approval for a "group care" facility at 1216 Middle Street, an "institutional" facility at 800, 814, 816 and 818 East

Ohio Street and a "group care" facility at 422 and 424 Tripoli Street. At the time, 142 individuals were residents at the Northside facilities of ARC; the applications sought approval for 99 residents.

(19) Frederick Just, the senior planner of the Planning Department and the person responsible for processing City group home applications, recommended approval for three of seven facilities, including 1216 Middle Street and 800 East Ohio Street, for a total occupancy of 65 residents. The Planning Department also recommended that the City of Pittsburgh allocate $75-100,000 in federally financed money from the Community Development Block Grant for necessary renovations.

(20) The senior planner concluded that such a recommendation would appease neighborhood residents, in which event, the Planning Commission would recommend the three facilities for approval.

(21) Greg Schlinkmann, the person responsible for liaison with the community and employed by the Planning Department, recommended approval for the Tripoli Street buildings (at a reduced capacity) as well as the 1216 Middle Street and 800 E. Ohio Street facilities.

(22) On September 14, 1982, at a public hearing conducted by the Planning Commission with respect to the applications, the East North Side Area Council, a community organization, expressed hostility towards ARC and the presence of recovering alcoholics but agreed to accept as many as two facilities of ARC in the neighborhood.

(23) On May 6, 1983, Charles Cain, the Director of ARC, in response to the order of the Hon. Maurice B. Cohill of this court limiting the population at the Allegheny County Jail and in response to the newly enacted mandatory state sentencing law for persons convicted of driving under the influence of alcohol, publicly stated that ARC would accept DUIs at its Northside facilities.

(24) The East North Side Area Council held a meeting on July 12, 1983, and demanded through Councilman William Robinson that the Council of the City of Pittsburgh close all facilities of ARC.

(25) On July 18, 1983, Council members Woods, Robinson, and Madoff introduced a resolution stating that Council intended to place a moratorium on the establishment of group homes in the City of Pittsburgh, whether funded by the County of Allegheny or State of Pennsylvania, until the County established a mutually acceptable procedure regarding the location of such homes. The resolution was adopted on that date.

(26) The Planning Department has the responsibility of processing money received by the City of Pittsburgh from the federal government for the Community Development Block Grant Program.

(27) On October 25, 1983, Ray Reaves, deputy director of the Planning Department, in an internal memo, recommended that only one ARC facility be approved, (1216 Middle Street), and that $200,000 in Community Development funds be provided to relocate the other residents to an Ohio Township site.

(28) Richard Bruce, Inspection Supervisor of the Bureau of Building Inspections, advised the Planning Commission that 1216 Middle Street satisfied all building codes and was safe.

(29) On October 25, 1983, the Planning Commission recommended approval of the facility at 1216 Middle Street but denied the Tripoli Street and East Ohio Street locations.

(30) On November 21, 1983, Council rejected all three applications. No hearing was held before that body, and no findings of fact or reasons were given for the rejection.

(31) Like ARC, "institutional facilities" operated by the Salvation Army, Goodwill Industries and the Abraxas Foundation also accepted DUIs. Each was requested by the City to seek new occupancy permits. Each facility, except ARC, chose to return DUIs to the Allegheny County Jail, thereby avoiding a confrontation with the City.

(32) Shortly thereafter, Paul Imhoff, the Director of the Bureau of Building Inspections, ordered ARC to stop accepting persons serving sentences for crimes under the Alternative Housing Program conducted by Allegheny County. ARC continued to accept DUIs.

(33) Frederick Just continued to work with Charles Cain to locate an alternate site for ARC.

(34) The Planning Department considered community opposition to be a determinative factor in site selection for ARC. Mr. Just suggested to Charles Cain that ARC locate in an area removed from residential property to reduce community opposition.

(35) The Planning Department concluded that community opposition had to be considered in selecting alternate sites due to Council's stated opposition to group homes.

(36) ARC considered St. Margaret's Hospital in the Lawrenceville section of Pittsburgh as an alternate site, and the Director sought Community Development funds for renovation of the site. The proposal was rejected by the Planning Department due to anticipated community opposition.

(37) All attempts to relocate the ARC facilities or its residents were met with community hostility. No acceptable alternate site was located by Frederick Just or Elizabeth Pugh, the Director of the Pittsburgh Relocation Agency, a division of the Urban Redevelopment Author-

ity of Pittsburgh (URA), or Operation Lifeboat, A City-County Task Force, or Charles Cain.

(38) No other facilities in the City of Pittsburgh or County of Allegheny provide the type of services rendered by ARC.

(39) The U.R.A. could not place ARC residents in group care facilities because of prejudice against alcoholics.

(40) The U.R.A. conducted a preliminary study of the feasibility and cost of renovating 800 E. Ohio Street and 1216 Middle Street because no alternate site was available for ARC residents.

(41) The Relocation Director of the U.R.A. determined that it would be more economical to renovate the existing facilities than to relocate the residents, even if an alternate site was available.

(42) Between the adoption of the group home amendment on September 15, 1980, and the enactment of the moratorium on July 18, 1983, City Council approved 16 of the 17 applications for group homes.

(43) Since the moratorium of July 18, 1983, one group home application was approved while nine were denied including Council's rejection on May 20, 1985 of ARC's application for 800 E. Ohio Street.

(44) Of the group home applications submitted since the moratorium, five were recommended by the Planning Commission. Each application which was subject to community opposition was rejected by Council. The only application approved by Council reduced the number of occupants from more than one hundred to twenty, and for that reason was not opposed by the community.

(45) In the fall of 1984, City and County officials and representatives of ARC met to attempt a resolution which would keep ARC at a Northside facility. An agreement

was reached which was dependent, at the insistence of the City of Pittsburgh, on the agreement of local community organizations.

(46) The agreement provided for:

(a) a reduction in the number of Northside facilities operated by ARC to one at 800 E. Ohio Street;

(b) a maximum of 50 residents at that facility;

(c) renovations and site improvements to be funded by $100,000 of City and $100,000 of County C.D.B.G. funds, subject to formal approval of the Commissioners and Council;

(d) one-third of the board members of ARC were to be appointed by Council and the Commissioners of Allegheny County with the expectation that community residents would serve, and all ARC staff members would be removed from the Board;

(e) monitoring by the City and County of performance and regular meetings of the ARC Board with the neighborhood groups;

(f) the County would seek funding to hire a new administrative officer;

(g) no DUIs would be placed at the Northside facility, and

(h) the County would invest an additional $100,000 in C.D.B.G. funds to acquire or improve ARC facilities located in the County of Allegheny.

(47) The $100,000 in Community Development funds were available for at least a two-year period.

(48) The City and County representatives had been given informal authority by the City and County administrations to reach a resolution.

(49) ARC officials were unable to obtain the agreement of the East North Side Area Council. The senior planner determined, based in part on past experience with this group, that additional efforts would be futile.

(50) A second community organization, the East Allegheny Community Council, eventually agreed to the proposal; however, the group sought additional concessions including that other ARC properties be sold only with their concurrence.

(51) ARC's Board was reconstituted in September, 1984 and by-laws were adopted which place all decision-making authority with the Board.

(52) The East Allegheny Community Council is funded by the City of Pittsburgh with Community Development Block Grant funds.

(53) If the request for funding of necessary renovations at 800 E. Ohio Street had been processed in the usual manner and without political opposition, approval would have been forthcoming.

(54) The time devoted to the ARC matter by the URA staff, as well as the time that would have been expended assuming the project had proceeded, was paid for by Community Development Block Grant funds.

(55) The City of Pittsburgh has identified the housing needs of handicapped persons to be a special need in its C.D.B.G. Housing Assistance Plan. This Plan is required as part of the application for Community Development Block Grant funds. The Housing Assistance Plan identifies 9,434 non-elderly handicapped persons in need of housing assistance in the City of Pittsburgh.

(56) Following a review of the testimony presented at a public hearing of the Planning Commission on February 5, 1985, the Planning Department recommended that ARC's application be approved for 55 residents. The following conditions were also recommended: that

an outside full-time director be hired by the ARC Board within 60 days of approval of Council; three neighborhood residents (one from each of the community organizations and one from the local business association) be appointed to the ARC Board within 30 days of Council's approval; funds for bringing the facility to Code be secured within 90 days of Council's approval; and that a site plan to include a privacy fence, landscaping and recreation area be submitted to the Department of Planning within 30 days of approval.

(57) The Zoning Code group home amendments require that:

(1) an advisory board in part made up of community residents to deal with community concerns and submit reports which are to be forwarded to the Bureau of Building Inspections;

(2) a semi-annual certification procedure conducted by the B.B.I.; and

(3) failure to comply with conditions set by Council or the procedures required by the Code would be grounds for revocation of an occupancy permit by the Bureau of Building Inspections.

(58) All of the conditions and requirements for zoning approval were met in the 800 East Ohio Street application.

(59) The property at 800 E. Ohio Street is located in a C-3 commercial district. Under the open space requirements normally applicable in C-3 districts, (Ordinance at § 955.05(7)), a building may not cover more than 60 percent of the total lot. However, the site plan process is applicable to institutional facilities such as ARC in C-3 districts. (Ordinance at §§ 955.06 and 955.04). The 800 E. Ohio Street building covered only 33 percent of the lot (5,352 square feet of building on 16,217 square feet of total grounds). Under either procedure, ample open space was available.

(60) The Zoning Ordinance also addresses "impaction" or spacing concerns. For example, group care facilities cannot be located within one-quarter mile and group residence facilities cannot be located within one-half mile of other such facilities or an institutional facility or an outpatient drug and alcohol clinic. ARC's application met such spacing requirements.

(61) No evidence was submitted at the public hearings of February 5 or September 14, 1982 conducted by the Planning Commission that nearby property values would be diminished if ARC occupied 1216 Middle Street or 800 E. Ohio Street.

(62) Based on the lack of proof and experience with other established group homes, Frederick Just concluded that property values would not depreciate.

(63) The Planning Department concluded that, in light of the reduction in buildings and clients, the performance conditions recommended, and the semi-annual recertifications, the surrounding area would not be negatively affected by the proposal.

(64) One factor considered in recommending approval of 800 E. Ohio Street was the negative impact on the surrounding area if ARC were to close and the residents returned to the streets.

(65) But for the provision of supervision and treatment, the ARC facility at 800 E. Ohio would be eligible for zoning approval as a lodging house without approval by Council.

(66) The Neighborhood Commercial Improvement Program is a C.D.B.G. funded program for building improvements within targeted areas. The East Ohio Street commercial district is an eligible target area up to but not including 800 E. Ohio Street.

(67) Certain administrative activities of the Department of Planning, including those activities of the senior and community planner which involve non-profit organi-

zations serving low income persons such as ARC, are paid by C.D.B.G. funds.

(68) ARC provided a valuable service to the Court of Common Pleas of Allegheny County, Pennsylvania by offering treatment without total confinement to those with a drinking problem who are convicted of driving while under the influence of alcohol.

(69) Alcoholism is defined by the medical and psychiatric professions as a disease which is both disabling and a handicap.

(70) Alcoholics who are drinking alcoholic beverages are subject to severe physical and psychological deterioration. An alcoholic is never fully cured. Even after years of sobriety, a return to drinking results in a resumption of the destruction previously experienced.

(71) The medical profession has concluded that in many instances there may be a propensity towards alcoholism which is inherited or otherwise inately acquired.

(72) Societal prejudice has existed historically with respect to alcoholics, including a resistance among many people to accept recovering alcoholics within the community.

(73) The evidence preponderates that a recovering alcoholic is as likely to be a responsible citizen and good neighbor as a non-alcoholic person.

(74) Group residential treatment plays an essential role in the recovery of a substantial number of alcoholics.

(75) The structured setting of a residential treatment program, and the mutual support provided by the residents is an important aspect of treatment.

(76) The residents of ARC are forbidden to use alcohol. Unless inconsistent with other prescribed medication, residents must take Antabuse, which causes discomfort if alcohol is consumed within seven days. Residents

must participate in group and individual therapy sessions. They must earn gradual and decreasing restrictions on their outside activities. There is 24-hour supervision including hourly inspections of the building.

(77) The location of a group residence in a community is important to the re-entry of an alcoholic into the community, to the availability of jobs and community services, and to a sense of self-worth.

(78) ARC has been an important resource to alcoholics who have been discharged from alcohol treatment programs administered by various hospitals in this community.

(79) Except for St. Johns and St. Francis Hospitals, hospitals in the Pittsburgh area are not reimbursed for providing extended treatment to alcoholics; alcoholics are often discharged without extended treatment for their alcoholism.

(80) In January, 1985, ARC was compelled to agree to decline new residents until conditional use approval and an occupancy permit was approved. Since then, ARC has been forced to decline to admit approximately seven alcoholics per month without treatment and others who were referred by various hospitals.

(81) If ARC is required to close, it is likely that the present residents will return to drinking with the danger of physical and psychological deterioration and perhaps death.

(82) If ARC closes, the population of homeless street people in the City of Pittsburgh will likely increase by 10 to 20 percent. A substantial number of these people are alcoholics.

(83) Street people place heavy demands on municipal services such as fire protection, police and emergency medical care.

(84) A substantial number of vacant buildings are occupied by street people from time to time, thereby increasing the risk of fire and danger to firemen, neighboring community residents and the street people themselves.

(85) There is a need for additional group residential treatment facilities for recovering alcoholics in the neighborhoods of the City of Pittsburgh and on the Northside in particular.

(86) The building at 800 East Ohio Street does not meet the Pittsburgh Building and Fire Codes. However, this is not relevant to conditional use approval. It is relevant to the issuance of an occupancy permit after approval of a conditional use.

(87) Approximately $60,000 in renovations are required to bring the building to the standards of the Building and Fire Codes.

(88) Allegheny County has committed $100,000 for building and site improvements at 800 East Ohio Street upon condition that the City of Pittsburgh grant conditional use approval.

(89) City Council has denied the ARC application and other group home applications since July, 1983, because Council perceives an inbalance between group homes in the City and the County and that more group homes should be established without the City.

(90) The evidence established that there is no inbalance between the number of group homes in the City of Pittsburgh and the number of group homes in the County of Allegheny, particularly when the number of persons in need of such homes from the City is considered.

(91) Council has stated that group homes will no longer be established in the City until the County of Allegheny enters into a mutually acceptable agreement to locate more group homes in the County.

(92) Council has determined and communicated to the Planning Department, group home providers, and residents that neighborhood opposition to group homes will be cause for denial.

(93) The Board of the Catholic Institute of Pittsburgh, which owns the property located at 800 East Ohio Street, has agreed to donate the property to ARC so long as the premises continue to be used for charitable purposes.

(94) The treatment received at ARC permits a number of present residents to receive public assistance. If forced to move from ARC, public assistance may be terminated.

(95) The evidence established that the decision of the Commonwealth of Pennsylvania to revoke the license of ARC at 800 East Ohio Street was based on the conditions which existed subsequent to the unconstitutional decision of the City of Pittsburgh to deny building permits and conditional use approval to ARC.

(96) If the City of Pittsburgh had granted building permits to enable ARC to undertake repairs and renovations at 800 East Ohio Street, and granted the conditional use application at the facility, necessary repairs would have been undertaken to meet all requirements of the Department of Health of the Commonwealth of Pennsylvania.

(97) The decision of the Council of the City of Pittsburgh to deny the applications of ARC for conditional use approval at 1216 Middle Street and 800 East Ohio Street violated the constitutional rights of plaintiffs to equal protection of the laws guaranteed by the Fourteenth Amendment.

(98) The equitable ejectment action filed by the City of Pittsburgh against Charles Cain and ARC House, Inc., at 6D-84-6120 in the Court of Commons Pleas of Allegheny County, Pennsylvania constitutes neither a bar

to the assertion of plaintiffs' federal rights nor a bar to the motion of ARC to intervene.

(99) Plaintiffs federal claims are not barred by the state court action because (a) they were not parties to the action; (b) they had no duty to intervene; (c) there was no final state court judgment on the merits; (d) the instant cause of action arose subsequent to the state court litigation; (e) the doctrine of claim and issue preclusion is not applicable; and (f) 28 U.S.C. § 1738 is inapposite.

(100) The federal claims of ARC are not barred by the state court action because (a) the consent decree of January 14, 1985 was not a final state court order; (b) the federal claims of ARC were not, and could not have been raised within the scope of the state court proceeding instituted by the City of Pittsburgh; (c) ARC's federal claims arose subsequent to the state court litigation; (d) the doctrine of claim and issue preclusion is not applicable; (e) 28 U.S.C. § 1738 is inapposite; and (f) abstention is warranted.

(101) The motion of ARC to intervene must be granted and, for the reasons rehearsed, we conclude that the decision of the Council of the City of Pittsburgh to deny the applications of ARC for conditional use approval at 1216 Middle Street and 800 East Ohio Street violated the constitutional rights of ARC to equal protection of the laws guaranteed by the Fourteenth Amendment.

II. *Conclusions of Law*

(1) This court has jurisdiction by reason of 28 U.S.C. § 1343(3) and (3) and 28 U.S.C. § 1331.

(2) Declaratory and injunctive relief are available pursuant to 28 U.S.C. §§ 2201-2202.

(3) Abstention is not warranted, under the circumstances, because plaintiffs have a right to assert federal claims in a federal forum. Moreover, plaintiffs are not

parties to any ongoing state proceeding in which their constitutional claims can be raised or complete relief obtained. *New Jersey-Philadelphia Presbytery v. Jersey State Board*, 654 F.2d 868 (3d Cir. 1981).

(4) Plaintiffs' claims are not barred by *res judicata* under federal or state law because: (1) they are not parties to any previous state court actions involving the matters here asserted, *Duquesne Slag Products Co. v. Lench*, 490 Pa. 102, 415 A.2d 53 (1980); (2) there is no final judgment on the merits with respect to any claim now asserted which is entitled to full faith and credit under 28 U.S.C. § 1738, *Wade v. City of Pittsburgh*, 765 F.2d 405 (3d Cir. 1985). *New Jersey-Philadelphia Presbytery v. New Jersey State Board, supra;* (3) the January 1985 consent order in the Court of Common Pleas of Allegheny County, Pennsylvania at No. 6D-84-6120 is not binding on plaintiffs here because they were nonparties, *Sabatine v. Commonwealth of Pennsylvania*, 497 Pa. 453, 442 A.2d 210 (1982); (4) the state court order did not encompass plaintiffs' causes of action, *In re Jones & Laughlin Steel Corp.*, 328 Pa. Super. 442, 477 A.2d 527 (1984); and (5) previous state court orders and litigation between ARC and the City cannot bar plaintiffs' claims based on Council's action of May, 1985, because the instant cause of action arose thereafter. *Harris v. Pernsley*, 755 F.2d 338 (3d Cir. 1985).

(5) Plaintiffs were not required to intervene in any civil actions filed by or against ARC House in state court. *New Jersey State Board, supra; Bannard v. New York State National Gas Corp.*, 404 Pa. 269, 172 A.2d 306 (1961).

(6) The City of Pittsburgh, by the July 1983 declaration of Council that further group homes funded by the County of Allegheny or Commonwealth of Pennsylvania would not be permitted in the City of Pittsburgh, violated the right to equal protection of the instant class of hand-

icapped persons who need to reside and receive rehabilitative services in a group facility. *City of Cleburne, Texas v. Cleburne Living Center,* —— U.S. ——, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

(7) The declared moratorium of July 18, 1983 chilled the exercise of constitutional rights of the instant class of handicapped persons in need of residential and rehabilitative services in a group facility and those organizations, such as ARC, which are organized for the purpose of meeting the needs of such handicapped persons.

(8) The action of the City of Pittsburgh in rejecting the applications of ARC for conditional use of the facilities at 1216 Middle Street and 800 E. Ohio Street was not rationally related to a legitimate governmental purpose. *City of Cleburne, supra* at ——, 105 S.Ct. at 3257; *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

(9) The City of Pittsburgh had no legitimate interest in excluding the instant class of handicapped persons in need of residential and rehabilitative services at the facilities in dispute due to opposition based on unfounded fear, speculation and prejudice. *City of Cleburne, Texas v. Cleburne Living Center, supra; J.W. v. City of Tacoma, Washington,* 720 F.2d 1126 (9th Cir. 1983).

(10) The City of Pittsburgh had no legitimate interest in excluding the instant class of handicapped persons in need of residential and rehabilitative services at the facilities in dispute due to the perceived failure of a separate legal entity, i.e., the County of Allegheny, to locate additional group homes without the City.

(11) To the extent that the number of group homes in the City of Pittsburgh is a legitimate concern, defendant legislated this concern by prohibiting the location of a group residence facility within one half mile of another group residence, a group care facility, an insti-

tutional facility or an outpatient drug and alcohol clinic, and by prohibiting the location of a group care facility within one quarter mile of such facilities or clinics. ARC's applications are not inconsistent with this legitimate requirement.

(12) The City of Pittsburgh had no legitimate interest in denying the application for 800 E. Ohio Street because it might impede the normal and orderly development of surrounding properties and impair neighboring property values absent some demonstration that such an occurrence would be caused by something more than unfounded fears, speculation or prejudice. *J.W. v. City of Tacoma, supra.*

(13) No evidence was presented at the hearing before Council on February 5, 1985 or before this court that the presence of ARC would impede the orderly development of neighboring properties or reduce property values, although the resolution of Council was grounded on such reasoning. Indeed, the staff of the Planning Department opined that presence of ARC would not impede development or reduce property values, and the evidence before this court is to the same effect.

(14) There was no evidence presented at the hearing before the Planning Commission or before this court to substantiate any limitation on lot area or side yard dimension causing a deficiency in recreation area and open space for adequate light, air and noise dispersion. On the contrary, the testimony at both hearings established that all zoning requirements were met and that ample open space was available.

(15) The reasons cited for the resolution of Council to deny the application of ARC are pretextual.

(16) None of the reasons offered by defendant for denying ARC's application—building code violations and license review—are relevant to approval of a conditional use; these concerns are relevant only to an occupancy permit.

(17) Council's discretion to deny a conditional use is sharply limited under state law. A conditional use is a permitted use, unless the objectors prove that approval is likely to substantially affect the health and safety of the community in an adverse manner. *Robinson Township v. Westinghouse Broadcasting Co.*, 63 Pa.Cmwlth. 510, 440 A.2d 642 (1981). No such evidence was presented to council.

(18) Statutory classifications which affect the mentally retarded must be rationally related to a legitimate governmental purpose. *City of Cleburne, Texas v. Cleburne Living Center*, —— U.S. at ——, 105 S.Ct. at 3257 (1985). Recovering alcoholics are entitled at least to the same standard of judicial review.

(19) Recovering alcoholics have been: (1) victims of historic prejudice; (2) saddled with a disability; (3) members of an immutable class; and (4) relatively politically powerless. *Medora v. Colautti*, 602 F.2d 1149 (3d Cir.1979).

(20) Access to treatment in a group residential facility is essential to effective treatment of recovering alcoholics and their reintegration into society.

(21) Although the Pittsburgh Zoning Ordinance does not refer specifically to alcoholics or recovering alcoholics, the decision of Council to single out the individuals living at the group residential facilities of ARC, at these particular locations, and receiving health, social or rehabilitative services, is an unconstitutional application of the Ordinance because it effectively discriminates against plaintiffs; burdens their access to appropriate treatment; and under the circumstances, is unrelated to any rational governmental purpose.

(22) It is not a valid justification for a discriminatory application of an ordinance that other groups of handicapped persons in need of residential and rehabilitative

services in a group facility also are subject to discriminatory treatment.

(23) The application of the Zoning Ordinance with regard to ARC's applications violated plaintiff's right to equal protection of the laws. *City of Cleburne, Texas, supra; J.W. v. City of Tacoma, supra.*

(24) In failing to demonstrate or even articulate any rational relationship to an important governmental purpose or interest in denying the applications at 1216 Middle Street and 800 E. Ohio Street, the City acted in an arbitrary manner in violation of plaintiff's rights to substantive due process, *J.W. v. City of Tacoma, supra,* in addition to the right to be treated equally by the law.

(25) The City of Pittsburgh is a recipient of federal financial assistance in the form of Community Development Block Grant funds.

(26) These funds assist various forms of community development, nearly all of which require zoning approval before they can proceed.

(27) In withholding zoning approval to plaintiffs, a class of handicapped persons who need to reside and receive rehabilitative services in a group facility, the City of Pittsburgh discriminated against the class of otherwise qualified persons in violation of the Rehabilitation Act of 1973, 29 U.S.S. § 794. Plaintiffs have established that they are (a) handicapped individuals; (b) otherwise qualified for benefits from which they have been excluded; (c) solely because of their handicap; and (d) the program is subject to § 504. *Strathie v. Department Trans.* 716 F.2d 227 (3d Cir.1983). Defendant failed to establish that its actions were either substantially justified or reasonable. *Id.* at 230.

(28) But for community opposition, the City of Pittsburgh directly or through the Urban Redevelopment Authority would have spent $100,000 of Community Devel-

opment Block Grant funds to renovate the ARC facility at 800 E. Ohio Street.

(29) The City of Pittsburgh failed to reasonably accommodate the handicap of those who require group residence and rehabilitative services by denying the application for zoning approval of the ARC facilities at 800 E. Ohio Street and 1216 Middle Street when all enumerated and enforceable conditions suggested, in part, by defendant's officials were satisfied. *Nelson v. Thornburgh*, 567 F.Supp. 369 (E.D.Pa. 1983), *affd.* 732 F.2d 146 (3d Cir.1984).

(30) Plaintiffs' contention that the Zoning Ordinance is violative of the Fourteenth Amendment on its face is without merit.

(31) The motion of ARC to intervene must be granted because the claim of ARC meets the test Fed.R.Civ.P. 24(b) and the federal claims of intervenor are not barred under federal or state law for the following reasons: (a) the consent decree of January 14, 1985 in the Court of Common Pleas of Allegheny County, Pennsylvania was not a final state court order adjudicating the constitutional claims of ARC; (b) the federal claims of ARC were not, and could not have been raised within the scope of a state court eviction proceeding, as the able state court judge noted; (c) ARC's federal claims arose from the acts of Council, i.e., administrative rulings, and an unappealed administrative ruling is not entitled to full faith and credit under 28 U.S.C. § 1738, *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 470, 102 S.Ct. 1883, 1891, 72 L.Ed.2d 262 (1982); (d) the docrine of claim or issue preclusion is inapplicable under state or federal law; and (e) abstention is not warranted. *Wade v. City of Pittsburgh*, 765 F.2d 405 (3d Cir.1985).

(32) The decision of the Council of the City of Pittsburgh to deny the applications of ARC for conditional use approval at 1216 Middle Street and 800 E. Ohio Street

violated the constitutional right of ARC to equal protection of the laws and due process guaranteed by the Fourteenth Amendment for the reasons rehearsed.

(33) The request of plaintiffs for a judgment declaring that the zoning ordinance of September 15, 1980 is unconstitutional on its face must be denied.

(34) Plaintiff and intervenor are entitled to preliminary injunctive relief because plaintiffs have established by a preponderence of the evidence that: (1) they are likely to succeed on the merits; (2) they are subject to irreparable harm pendente lite; (3) defendants will suffer no harm from the grant of an injunction; and (4) the public interest requires that plaintiffs be accorded relief. *Constructors Association of Western Pennsylvania v. Kreps*, 573 F.2d 811 (3d Cir.1978).

III. *Injunctive Relief*

(35) Plaintiffs and intervenor are entitled to a preliminary injunction requiring the City of Pittsburgh to grant to ARC a conditional use approval for a group care facility at 1216 Middle Street, and a conditional use approval for an institutional facility at 800 E. Ohio Street.

(36) Plaintiffs and intervenor are entitled to a preliminary injunction requiring the City of Pittsburgh to grant building permits to ARC to undertake repairs and renovations at 1216 Middle Street and 800 E. Ohio Street to bring those facilities into compliance with Electrical, Fire and other relevant Codes, if any.

(37) Plaintiffs and intervenors are entitled to a preliminary injunction requiring the City of Pittsburgh to grant occupancy permits to ARC at the two facilities without undue delay, following compliance by ARC with all Electrical, Fire and other Codes, if any, which permits shall not be unreasonably denied by the City.

(38) Plaintiffs and intervenors are entitled to a preliminary injunction requiring the County of Allegheny

and the City of Pittsburgh to appropriate and deposit in an appropriate account, within 90 days, the sum of $50,000 each, or a total sum of $100,000 of Community Development Block Grant funds to enable ARC to undertake the necessary repairs and renovations at the two facilities to bring those structures into compliance with all applicable codes, without undue delay.

(39) The sum of $100,000 shall be placed in an appropriate account at Mellon Bank, N.A., in the name of Donald Driscoll, Esquire, counsel for Neighborhood Legal Services Association, as trustee for ARC, to finance the necessary repairs, or renovations. Counsel and the NLS shall at all times be jointly and severally responsible and accountable for the aforesaid funds, and shall indemnify the payors in the event of any loss.

(40) No payment shall be made for necessary repairs unless approved by Donald Driscoll, Esquire, and counsel shall advise the court of all expenditures in a monthly written progress report.

(41) After initial code repairs have been completed, the County of Allegheny and the City of Pittsburgh shall appropriate additional Community Development Block Grant funds to finance renovations and site improvements at 800 E. Ohio Street to permit ARC to provide services to no more than 50 residents at the facility.

(42) The aforesaid site plan shall include, with respect to 800 E. Ohio Street, a privacy fence, landscaping, exterior renovations on E. Ohio Street, and a recreation area.

(43) The City and County may require ARC to execute documents as are typically required to CDBG recipients, provided that nothing contained therein shall be inconsistent with these findings and conclusions of law.

(44) Counsel for plaintiffs shall submit to the court within 10 days an appropriate preliminary injunctive decree which incorporates the aforesaid relief, as well as additional relief which may be appropriate.

No. 87-83

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF PITTSBURGH, PENNSYLVANIA,
PAUL J. IMHOFF, Superintendent of the Pittsburgh
Bureau of Building Inspections, and
ROBERT J. LURCOTT, Director of the Pittsburgh
Department of City Planning,

Petitioners,

vs.

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSEWEIR,
HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK and
JOHN KING, on their own behalf and on behalf
of all others similarly situated, and
ALCOHOLIC RECOVERY CENTER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION

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Constitutional Provisions and Statutes:

Supplemental Statement of the Constitutional and Statutory Provisions Involved

Amendment XIV, Sections 1 and 5, of the United States Constitution provides in relevant part as follows:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, 29 U.S.C. §794 (1986) provides in relevant part as follows:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-83

THE CITY OF PITTSBURGH, PENNSYLVANIA, PAUL J. IMHOFF, Superintendent of the Pittsburgh Bureau of Building Inspections, and ROBERT J. LURCOTT, Director of the Pittsburgh Department of City Planning,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION

Counter-Statement of the Case

The Petitioners, City of Pittsburgh, *et al.* (hereafter "City"), understate the claims of the Respondents, who were the Plaintiffs before the District Court and will be referred to as "Plaintiffs" hereafter. The District Court found that for approximately a twenty-two month period prior to filing suit in May, 1985, the City had engaged in a pattern and practice of deliberate discrimination against Plaintiffs which caused irreparable harm and threatened to cause further such harm. (Findings of Fact 25, 38, 39, 64 and 68-86 (hereafter F-25 etc.), set out in Appendix B to the Petition for Certiorari and 620 F.Supp. 935 (W.D. Pa. 1985)). The District Court's findings of fact have not been disputed.

The Plaintiff class, as certified by the District Court, consists of all handicapped persons in need of group, residential, rehabilitative services in the City of Pittsburgh (77a (referring to p. 77 of the Appendix filed with the Court of Appeals)). A sub-class of such persons who are recovering alcoholics was also certified (77a). The named Plaintiffs consist of persons who reside or desire to reside in facilities operated in the City of Pittsburgh by ARC (the Alcoholic Recovery Center, Inc.) (8a, 9a).[1]

Over and above the City's actions in denying ARC's applications for zoning approval in November, 1983 (F-30) and May, 1985 (F-43) (the latter decision was not formally effective until June 6, 1985 (1124-27a)), the City

[1] Subsequent to the filing of the Complaint ARC moved to intervene. This motion was granted at the time the preliminary injunction was issued. In addition, the City joined the County of Allegheny, Pennsylvania and the Allegheny County Institution District as Third Party Defendants. The County did not appeal the issuance of the preliminary injunction nor take part in the appeal before the Court of Appeals.

violated the Plaintiffs' civil rights by adopting a moratorium on the approval of any additional group homes in Pittsburgh (F-25), by denying building permits necessary to correct dangerous conditions in the facilities they already occupied (F-16, 86, 95, 96), and by withholding Community Development Block Grant assistance for needed renovations and/or relocation due to the presence of community opposition (F-34-36, 45, 46, 49, 53). The May, 1985 zoning denial, based on a wholly pretextual recitation of zoning considerations, was merely the latest action taken in furtherance of a July, 1983 resolution by the City to deny group homes where there was community opposition (F-43, 44, 58, 92 and Conclusion of Law 15). This final step in May, 1985 threatened to add 27 desperate, handicapped persons to those already on the streets as a result of the City's actions (F-3, 64, 81). Substantial harm to these individuals and the community was likely (F-3, 64, 81, 83, 84). The City's characterization of this suit, as simply an appeal from an administrative zoning decision, is inaccurate.

Summary of the Argument

The Petition for Writ of Certiorari should be denied for the following reasons.

A. There is no conflict among the Circuit Courts of Appeals with respect to the propriety of federal court jurisdiction over §1983 actions. The availability of adequate state judicial remedies is not relevant to §1983 jurisdiction. State administrative actions which involve zoning denials may raise substantive constitutional and federal statutory violations for which §1983 provides a remedy. The Plaintiffs have asserted claims under the Fourteenth Amendment Equal Protection Clause and Section 504 of the Rehabilitation Act of 1973. This Court's ruling in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), that in certain instances state post-deprivation judicial remedies must be considered before a procedural due process claim is made out, is inapplicable.

B. This Court's reasons for determining in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985) that a single, uniform statute of limitations period best meets Congressional objectives in enacting the Civil Rights Act of 1871, fully apply in the instant case. The City has presented no reason to reconsider this decision.

C. Younger abstention is not called for in the present case for a number of reasons. Plaintiffs have not been a party to any state administrative or judicial proceeding. The pending state proceeding involving the federal Intervenor ARC was initiated by ARC to obtain remedial action from the City. That state proceeding does not provide an adequate opportunity to raise the federal claims raised herein. Proceedings of substance in the District Court had already occurred at the time the state court proceeding was initiated. This federal action was

necessary to protect important constitutional rights and prevent irreparable injury. The District Court was never asked to nor has it interfered with the state proceeding. The abstention decisions of this Court have been correctly followed by the Courts below.

D. The Courts below, in determining that Plaintiffs have standing to proceed in this matter, have correctly followed the decisions of this Court. The Plaintiffs have averred and demonstrated that actions by the City have caused them and threaten to cause them actual harm, and that the federal rights asserted are their own, not those of a third party or those shared by the public generally. Federal, not state, law determines who has standing to proceed in federal court. A state cannot frustrate the purposes to be served by the Fourteenth Amendment and the Civil Rights Act of 1871 by placing limits on who can seek relief from an unconstitutional zoning decision.

ARGUMENT

A. There is no conflict in the decisions of the Circuit Courts of Appeals with respect to the availability of Section 1983 to remedy federal constitutional and statutory violations of the nature raised in the present case.

The City cites a number of decisions rendered by the First, Second, and Seventh Circuits, contending that they cannot be reconciled with the decision of the Third Circuit in the present case. On the contrary, these decisions are fully consistent with one another, as they are with the controlling precedents of this Court.

The Court of Appeals determined that Plaintiffs had demonstrated violations by the City of their rights under

the Fourteenth Amendment's Equal Protection Clause and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. These violations consisted of actions by the City in denying to handicapped persons the opportunity to maintain and obtain essential group, residential, rehabilitative services in the City due to their handicap and due to community opposition based on their handicap. The City's actions were not related to any legitimate governmental interest. Instead, the City openly carried out a policy of deferring to the unfounded prejudice of community residents in denying to the Plaintiff class the opportunity to realize the equal protection of the laws, including federally funded programs designed to assist their integration into the community.

A brief analysis of the decisions of the First, Second and Seventh Circuits cited by the City discloses that these decisions do not conflict with the conclusions reached by the Third Circuit in the present case. In general these Circuit decisions correctly rely, in whole or in part, on this Court's opinions in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976) and *Parratt v. Taylor*, *supra*.

In *Paul v. Davis*, this Court held that not every violation of state law makes out a federal constitutional claim. Instead, only those acts under color of state law which violate a specific right secured by the Constitution may be remedied through the Fourteenth Amendment and §1983. In *Parratt v. Taylor*, this Court held that where it is impractical for a state to provide procedural protections prior to the deprivation of a protected property interest, it becomes necessary to consider the adequacy of post-deprivation procedures, including state judicial procedures, before determining that there has

been a violation of procedural due process. This Court in *Paul v. Davis*, was, thus, concerned with what constitutes a Constitutional deprivation in general, while in *Parratt* the Court addressed that which constitutes a procedural due process violation.

The First Circuit in *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) followed *Paul v. Davis* in holding that a due process violation is not made out where there is a mere allegation of violation of state law and the state judiciary is available to remedy this. The Court was careful to point out that a deprivation of a specific Constitutional right was not stated. *Id.* at 1527. The Court distinguished the case before it from those presented to it in *Packish v. McMurtrie*, 697 F.2d 23 (1st Cir. 1983), *Manego v. Cape Code Five Cents Bank*, 692 F.2d 174 (1st Cir. 1982) and *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983). In each of these cases the violation of specific Constitutional rights was alleged: retaliation for the exercise of First Amendment rights (*Packish*); denial of equal protection due to discrimination based on race (*Manego*); and denial of due process (*Roy*).

The other First Circuit cases cited by the City expressly followed *Chiplin*, or were "essentially identical" to it. (*Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982)) *Chiplin*, 712 F.2d at 1527.

In the present case, the Plaintiffs did state and prove the violation of specific Constitutional rights, equal protection and substantive due process, in addition to a violation of Section 504 of the Rehabilitation Act of 1973. Plaintiffs were not attempting to bootstrap mere state law violations by local officials into federal

Constitutional claims. The City deliberately denied a segment of its population equal status under the law. There can be no question that this case is substantially different from *Chiplin* where an equal protection claim was expressly held not to have been stated. As is clear from *Chiplin* and *Manego*, the First Circuit was not holding that a plaintiff must first exhaust state judicial remedies before seeking to assert a federal court's jurisdiction to hear an equal protection claim. To do so would have been contrary to Congressional intent in enacting 42 U.S.C. §1983, as determined by this Court in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961) and *Patsy v. Fla. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

The Second Circuit in *Yale Auto Parts v. Johnson*, 758 F.2d 54 (2d Cir. 1985) and the Seventh Circuit in *Albery v. Reddig*, 718 F.2d 245 (7th Cir. 1983) also did no more than hold that a violation of state law in applying a local ordinance did not in itself make out a constitutional violation.

In *Yale*, the Court concluded that the plaintiff therein did not have a constitutionally protected property interest in the permit he sought. Instead he had a unilateral expectation in the permit, which was insufficient. The court distinguished cases where the locality had previously permitted or acquiesced in a particular use and was later acting to deny it. *Id.* 758 F.2d at 60 n. 9. Since there was no protected property interest, the fairness of the procedures afforded was irrelevant. The Court also expressly determined that there was no equal protection claim established since there was no allegation that the plaintiff was treated differently from others.

In *Albery*, the Court first rejected the plaintiffs' procedural due process claims under *Parratt*, since at most the defendant building inspector was negligent in failing to follow proper procedures and a state court remedy was available. The Court then examined whether an alleged error in applying a certain measurement standard for residential garage height constituted a substantive due process violation. The Court stated:

> To prevail on this theory, plaintiffs must allege and prove that the Zoning Ordinance or the Uniform Building Code (or whatever other legislative enactment may be controlling here) is arbitrary and unreasonable or that its application bears no substantial relation to the public health, safety or morals. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Albery, 718 F.2d at 251. The Court concluded that there was no substantive due process violation because the measurement standard itself was not unreasonable. Whether it was the correct standard to apply was a matter of state law, to be decided in state court.

Again, the decisions in *Yale* and *Albery* are easily reconciled with the present case. Most significant is that Plaintiffs herein claimed violations of substantive Constitutional rights, specifically equal protection and substantive due process. The District Court found a violation of both (Conclusion of Law 23 and 24), although the Court of Appeals in affirming only reached the equal protection claim and the Section 504 claim. A violation of procedural due process was not claimed herein.

Plaintiffs not only demonstrated that the City applied its zoning ordinance in a manner which bore no relation

to the public health, safety or morals, but in addition demonstrated that the City's reference to this ordinance was a pretext for a policy of denying group homes for the handicapped in need of rehabilitative services whenever a segment of the surrounding community voiced its objection. The City announced a predisposition to turn down all such applications due to community opposition and thus chilled the exercise of constitutional rights of those in need of such facilities and organizations, such as ARC, which were created to meet the needs of handicapped persons (Conclusion of Law 7). Even if a case by case appeal to the state's judiciary could address such fundamentally unfair and discriminatory treatment, it is clear that neither the cases cited by the City nor the decisions of this Court have required this.

The decision of this Court in *Parratt v. Taylor* does not apply to substantive due process or equal protection violations, or other substantive violations of the Constitution or federal law, such as the Rehabilitation Act of 1973. *Parratt v. Taylor* determined that in those circumstances where it is not practicable for the state to provide a meaningful pre-deprivation proceeding, the state action is not "complete" for procedural due process violation purposes at the point of the deprivation. Post-deprivation remedies must also be considered. *Id.* 451 U.S. at 542, 101 S.Ct. at 1916. Due to the random and unauthorized nature of the action challenged in *Parratt*, action which constituted a tort under state law, the Court held that it must decide whether the state's post deprivation tort remedies "satisfy the requirements of procedural due process". *Id.* 451 U.S. at 537, 101 S.Ct. at 1914.

On the other hand, a substantive due process violation is "complete as soon as the prohibited action is taken". *Daniels v. Williams*, _____ U.S. _____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), *Davidson v. Cannon*, _____ U.S. _____, 106 S.Ct. 668 (1986), concurring opinion of Justice Stevens, 106 S.Ct. at 678. The federal Constitution prohibits a state from taking action violative of substantive due process "regardless of the fairness of the procedures used to implement them". *Id.* quoting from the majority opinion of Justice Rehnquist in *Daniels v. Williams, supra*, 106 S.Ct. at 665. "[T]he independent federal remedy is then authorized by the language and legislative history of §1983." *Id.* 106 S.Ct. at 678. See also the concurring opinion of Justice Blackmun in *Parratt*, 451 U.S. at 545, 101 S.Ct. at 1918:

> [T]here are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 137 (1973).

The Courts of Appeals have also uniformly interpreted *Parratt* as not applying to substantive constitutional claims. See *Littlefield v. City of Afton*, 785 F.2d 596, 607-8 (8th Cir. 1986), and *Morello v. James*, 810 F.2d 344, 348 (2d Cir. 1987) and the cases cited therein.

The decisions of the Courts below in the present case are fully supported by and in fact required by this Court's ruling in *Cleburne v. Cleburne Living Center*, _____ U.S. _____, 105 S.Ct. 3249 (1985). *Cleburne* is virtually indistinguishable from the present case. Each involved a determination that the respective Cities violated the equal protection clause in *applying* their

zoning ordinances in the context of the applications for group home approval before them (*Cleburne*, 105 S.Ct. at 3259-60; Conclusion of Law 23, 620 F.Supp. at 945, 811 F.2d at 9). Neither this Court in *Cleburne* nor the District Court in the present case determined that the ordinances themselves were facially unconstitutional (*Cleburne*, 105 S.Ct. at 3258; Conclusion of Law 30).

Even if relevant, the City's attempt to distinguish *Cleburne* on the ground that the zoning denial in *Cleburne* was not subject to state judicial review, is without support. The cases relied on, *Sherwood Lanes, Inc. v. City of San Angelo*, 511 S.W.2d 597 (Ct. of Civil Appeals of Texas 1974) and *Marriott v. City of Dallas*, 644 S.W.2d 469 (Texas 1983), do not support the City's assertion. Instead, each case *involves* judicial review of the reasonableness of a zoning ordinance's special use permit requirement and its application to the particular facts arising therein. *Sherwood Lanes, Inc.*, 511 S.W.2d at 599, 600, *Marriott*, 644 S.W.2d at 471, 473. See also *City of Amarillo v. Stapf*, 101 S.W.2d 229, 233 (Op. of Commission of Appeals of Texas adopted by the Texas Sup. Ct., 1937) (An owner of property is entitled to direct access to the courts for the purpose of litigating whether a zoning ordinance is unreasonable, arbitrary or discriminatory regardless of whether the ordinance has made provision for it) and *City of College Station v. Turtle Rock Corp.*, 680 S.W. 2d 802, 806 (Texas 1984) (holding that the zoning ordinance under review was not arbitrary or unreasonable on its face, and remanding for a determination of reasonableness in the particular application raised therein).

The Courts of Appeals should be and have been diligent in following this Court's directions in determining that which constitutes a federal

Constitutional deprivation. Though the contours of a substantive due process claim are not as readily discernible as are other substantive Constitutional claims, the Court of Appeals in the present case did not need to and in fact did not reach this claim. The Third Circuit held that the claims based on the Rehabilitation Act of 1973 and the Equal Protection Clause fully supported the District Court's ruling. Thus, even if there is a disagreement among the Circuits as to what constitutes a substantive due process claim, and as set out above Plaintiffs do not believe that there is, this is not the appropriate case to reconcile such disagreement, since the Court of Appeals did not even reach that claim in this case.

B. The present case does not call for reconsideration of this Court's recent decision in *Wilson v. Garcia*, _____ U.S. _____, 105 S.Ct. 1938 (1985).

This Court in *Wilson v. Garcia, supra*, determined that the "federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored" the selection of the single most appropriate statute of limitations for all §1983 claims. *Id.* 105 S.Ct. at 1947. The Court further held that the nature of the §1983 remedy, and the historical context in which this section was enacted, support the limitation period applicable in each state to the recovery of damages for personal injuries as the most appropriate statute of limitations. *Id.* 105 S.Ct. at 1947, 1948. In doing so the Court recognized that any analogies to state statutory or common law remedies are bound to be imperfect. *Id.* 105 S.Ct. at 1945.

This case presents no reason to reconsider this decision. The essential nature of a §1983 claim is not which state official or entity causes the violation, but the

violation of the personal right itself. The City would not merely have this Court sanction different treatment of an equal protection claim from a false imprisonment claim, for example. Instead the City asks that equal protection violations by local agencies be treated differently than equal protection violations by other state officials. This Court in *Wilson* specifically rejected the adoption of a state limitation period based on the identity of the alleged wrongdoer. *Id.* 105 S.Ct. at 1949. To do so would run the risk that the limitation period would not serve the federal interests vindicated by §1983.

The instant case presents a prime example of how the federal interests would not be served by the adoption of the 30 day limitation period sought by the City. Uncertainty would result when actions are brought against both local agencies or governmental bodies and individual officials. Litigation would ensue over which state bodies or officials merit different treatment and which do not. The remedial purpose of §1983 would be frustrated, because 30 days in most cases is an insufficient period of time for the person harmed to take mental and emotional account of what has occurred, and then to seek and obtain legal representation, over and above the time required for the attorney to adequately investigate the matter and prepare a proper complaint. Actions may be brought, which otherwise may not, given that suits must be rushed into. There would be no time to negotiate a resolution of claims without litigation, and that would unnecessarily consume judicial resources.

The interests sought to be protected by the City in its Petition are not present in this case. This case does not involve unpaid volunteers who have rendered a routine zoning decision. Rather, this action was brought against

paid policy-making and supervisory-level officials, whose zoning decisions were but a part of a deliberate City policy to prevent a class of handicapped citizens from enjoying their rightful place within the community.

Lastly, even if the appeal period from an adverse administrative decision was adopted as the appropriate federal §1983 limitation period, this would be of no avail to the City in the present case. The City has contended that the May 22, 1985 filing of the Complaint in this action should not be timely as to the November 21, 1983 zoning denial. The City does not question the timeliness of Plaintiff's claims arising from the May 20, 1985 zoning denial.

Pennsylvania law provides that for an agency adjudication to be valid, there must be an opportunity for a hearing and the decision must be accompanied by findings and reasons. 2 PA. CONS. STAT. ANN. §§553, 555 (Purdon Supp. 1987). The City's November 21, 1983 action was taken without a hearing and without findings and reasons (F-30). Thus, even though this action effectively denied ARC zoning approval and building permits, it was not a valid agency action subject to appeal within 30 days under state law. See for example *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 431 A.2d 946, 948 (1981) (Adjudication was invalid since there was no opportunity for a hearing. The 30 day period in which to appeal was applicable to valid adjudications only).

C. The District Court, as affirmed by the Court of Appeals, correctly followed the decisions of this Court in refusing to abstain.

The City wrongly contends that this Court's decisions in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281 (1975) and *Ohio Civil Rights Commission v. Dayton Christian Schools*, _____ U.S. _____, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) require abstention in the present case.

In July, 1983, the City established a policy to deny group home occupation where there is community opposition. The Plaintiffs commenced this action on May 22, 1985 following a decision by the City to continue to adhere to that policy. Prior to July, 1983 the City had approved 16 of 17 group home applications. Following its July 1983 moratorium the City approved only one of ten (F-42, 43). The lone approval granted an application to *reduce* the number of residents in an existing home from more than 100 to 20. There was no community opposition to this application (F-44). Consistent with this moratorium, the City decided against spending federal Community Development Block Grant funds to assist group homes for the handicapped if there was community opposition presented (F-36, 45, 46, 53, 54).

On May 22, 1987 there were no pending administrative or judicial proceedings which dealt with the above described actions of the City. Although ARC had available to it an appeal from the City's May 20, 1985 denial of its application to continue to operate the facility at 800 E. Ohio Street, ARC had not appealed when Plaintiffs filed their District Court action (169a). The residents of 800 E. Ohio Street were in immediate danger of being put on the street without necessary

treatment. Numerous other handicapped persons were already on the street or otherwise without necessary community residential treatment, due to prior actions of the City (F-80).

The Plaintiffs sought a temporary restraining order and preliminary injunction to prevent immediate, irreparable harm of a substantial nature. The City agreed not to close the 800 E. Ohio Street facility until the preliminary injunction motion was decided. A preliminary injunction trial commenced on June 3, 1985 and continued over four days. In addition to seeking to enjoin the City from closing 800 E. Ohio Street, the Plaintiffs sought an order permitting them to reoccupy a second facility, 1216 Middle Street (which had been recently closed at the City's direction) and the expenditure of certain Community Development Block Grant funds which had been committed to do necessary repairs to the 800 E. Ohio Street facility but were not paid due to community opposition. At the commencement of this trial ARC moved to intervene as a plaintiff. The Court took this motion under advisement but permitted ARC to participate in the trial.

In addition to the preliminary injunction trial, the Court held five conferences between the parties, viewed the premises in question, and considered multiple briefs and post-trial factual submissions. Following the preliminary injunction trial, but before the issuance of this injunction, ARC appealed the May 20, 1985 zoning decision to the state Court of Common Pleas. In issuing the preliminary injunction the District Court permitted ARC's intervention. The District Court was neither asked to nor did it enjoin the state court appeal.

Dayton Christian Schools does not require the application of the *Younger* abstention doctrine for a number of reasons. First, unlike *Dayton*, the federal court plaintiffs are not a party to any state proceeding, administrative or judicial. Nor can the fact that the Plaintiffs' interests are somewhat related to ARC's impair their right to proceed in federal court. As noted by the Court below, the relationship between the Plaintiffs and ARC is similar to the relationship between the patient and treating physician in *Roe v. Wade, supra*, and unlike the employer-employee relationship in *Hicks v. Miranda, supra*. There can be little question that the Plaintiffs, most of whom are not even ARC residents, do not exercise control over this organization, particularly when contrasted with the control that an employer exercises over an employee. In *Hicks*, the employer and employee were represented by the same attorney. The employer in federal court sought to enjoin the state proceeding against the employee, and sought the return of its property that had been taken in the course of the state proceeding against the employee. The nexus referred to by this Court in *Doran v. Salem Inn*, 422 U.S. 922, 929, 95 S.Ct. 2561, 2566 (1975), that the federal plaintiff be closely related to the state defendants "in terms of ownership, control and management", is not approached in the present case.

Since the Plaintiffs have not been parties to the state proceeding, the adjudication of the merits of their federal claims in federal court creates no presumption of state adjudicative inadequacy. There is absolutely no indication that their effort to obtain federal court relief was in any way a sham to avoid any abstention theory applicable to ARC. As will be discussed *infra*, the Plaintiffs had standing to seek the District Court's relief in their own right.

Second, the state administrative proceeding that had been conducted (to obtain zoning approval for 800 E. Ohio Street) was a remedial action brought by ARC, not a coercive action brought by the state. As implicitly noted in *Dayton*, to apply abstention in this instance, even if Plaintiffs were a party to the State proceeding, would be to effectively overturn this Court's decision in *Patsy v. Board of Regents, supra. Patsy* reaffirmed that Congress had not intended that state administrative or judicial remedies be exhausted before bringing a §1983 action in federal court. To require abstention whenever remedial action has been sought from a state administrative body would effectively impose an exhaustion requirement because it is usually necessary to initiate such an administrative proceeding to obtain any action at all from the agency.

Third, unlike *Dayton, Hicks* and *Younger* there has been no request in the present case to enjoin any state proceeding, administrative or judicial. The District Court was not asked to, nor did it interfere in any way with the state proceeding available as a matter of right to ARC (but not to Plaintiffs) to object to the May 20, 1985, 800 E. Ohio Street zoning denial on state law grounds.

Fourth, again unlike *Dayton, Hicks* and *Younger*, proceedings of substance had occurred in the District Court at the time ARC took its appeal in state court. The District Court had devoted considerable resources, including a four day trial, in response to Plaintiffs' motion raising the threat of imminent, irreparable harm absent relief *pendente lite*. "[C]onsiderations of economy, equity, and federalism counsel against *Younger* abstention" at this point simply because a potential intervenor before it has commenced a state court proceeding. *Cf. Hawaii Housing Authority v. Madkiff*, 467 U.S. 229, 238, 104 S.Ct. 2321, 2328 (1984).

Fifth, the state court proceeding which was commenced did not provide Plaintiffs with an adequate opportunity to raise their federal claims, even if the Plaintiffs had been a party to this proceeding. As noted by the Court below "abstention is not warranted, in part because state action over a period of time affecting more than one treatment unit may be challenged in the federal proceeding but not in the state proceeding." *Sullivan, et al. v. City of Pittsburgh, et al.*, 811 F.2d at 178 n.6. While ARC could challenge the May 20, 1985 decision denying zoning approval for 800 E. Ohio Street, it could not raise in that appeal the City's prior actions in denying zoning approval to 1216 Middle Street and in withholding community development funds committed to and admittedly needed to correct dangerous conditions existing in the 800 E. Ohio Street facility.

This Court has repeatedly held that even where abstention is otherwise required, it is not called for in those extraordinary circumstances where federal court intervention is needed to prevent irreparable injury. *Younger*, 401 U.S. at 53, 91 S.Ct. at 755. See also the decisions of this Court cited by the Court below (*Sullivan*, 811 F.2d at 179). In these circumstances, the interests of federalism and comity cannot impede the exercise of federal court jurisdiction to safeguard the substantial rights intended to be protected by §1983.

In the present case, there was no provision for state court preliminary injunctive relief as part of ARC's appeal of the 800 E. Ohio Street decision. Even if there was, that would be inadequate to protect the numerous handicapped persons who were exposed to irreparable injury including death, due to ARC's inability to occupy 1216 Middle Street and due to its inability to utilize the federal funds committed to carry out necessary repairs of

dangerous conditions at 800 E. Ohio Street. As concluded by the Court below "it is difficult to conceive of many facts which would more compellingly argue for appellees' relief" (811 F.2d at 180).

For the above reasons, the determination of the District Court and the Court of Appeals not to abstain in the present case is fully consistent with the rulings of this Court.

D. The District Court as affirmed by the Court of Appeals correctly followed the decisions of this Court in determining that Plaintiffs had standing.

The City's proposition that federal court standing in a §1983 action is dependent on state law, which determines who may and who may not seek relief in state court, could not be more antithetical to the purposes underlying the adoption of the Fourteenth Amendment and enactment of §1983. Assuming the accuracy of the Pennsylvania restrictions on standing as put forth by the City, it was just that sort of inadequate state remedy that Congress intended to overcome through §1983, by providing a federal forum to vindicate important federal rights. *Patsy v. Florida Board of Regents, supra.*

Whereas state law may be relevant in determining when there is a property interest, the deprivation of which calls into play procedural due process protections, the Plaintiffs have not claimed that their procedural due process rights have been violated in the present case. Plaintiffs seek relief from invidious discrimination which has violated both their rights to equal protection under the Fourteenth Amendment, and their rights to take part on an equal basis in programs assisted with federal funds as guaranteed by the Rehabilitation Act of 1973. Standing to so proceed in federal court is determined by federal, not state, law.

The Court below correctly applied this Court's decision in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975). *Sullivan*, 811 F.2d at 175-76. Plaintiffs established an actual injury traceable to the conduct of the City sought to be enjoined. They asserted their own rights, not the rights of third parties or the public generally. See also *Village of Arlington Heights v. Metro. Housing Development*, 429 U.S. 252, 97 S.Ct. 555 (1977) (Plaintiff, an individual likely to reside in the specific project subject to the zoning denial, has adequately averred an actionable causal relationship between the zoning practices and his asserted injury, and thus has standing).

Plaintiffs in the present case have not only averred that they would reside in the specific project subject to the zoning denial, but many have already been residing and receiving necessary rehabilitative services there. The zoning denial threatened to put them or leave them on the street without treatment and subject to severe physical and psychological damage. This Court in *Warth* specifically noted that it is not necessary that a plaintiff have a contractual interest in a particular project to challenge the zoning practice. *Warth*, 422 U.S. at 508, 95 S.Ct. at 2210, n. 18.

The City's speculation about "what if" ARC decided against continuing to operate the facilities in question is not relevant in the present case since it has been clearly demonstrated that ARC does intend to continue to operate. Plaintiffs contend that when challenged state action has had a chilling effect on decisions to operate necessary facilities in a given locality, and even caused such organizations to discontinue existing operations, the state action may be challenged without the direct participation of the organizations. The District Court

found that the City's actions had this result. (F-31, 91, 92, Conclusions of Law 7). However, the Courts below did not reach this issue, and this Court need not, because ARC's continued intention to operate these facilities is not in question.

Conclusion

For the reasons set forth above, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted:

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No. 87-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF PITTSBURGH, PENNSYLVANIA, PAUL J. IMHOFF, Superintendent of the Pittsburgh Bureau of Building Inspection, and ROBERT J. LURCOTT, Director of the Pittsburgh Department of City Planning,
Petitioners,

v.

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSEWEIR, HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK and JOHN KING, on their own behalf and on behalf of all others similarly situated, and ALCOHOLIC RECOVERY CENTER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The City's Petition for a Writ of Certiorari presented this court with an important issue relating to the nature of federalism—whether state and local administrative agency decisions subject to state court review can give rise to Section 1983 violations.[1] Class-action plaintiffs' opposing brief at No. 87-83 both misinterprets the issue

[1] Despite class-action plaintiffs' claim to the contrary, the Third Circuit, in fact, reached this issue at A-27, n.14. Class-action plaintiffs contend that this Court should not hear this case because the district court decision was affirmed on the basis that the City violated the Rehabilitation Act of 1973. The City is prepared to defend that portion of the case before a jury in the hearing on the permanent injunction.

as well as obfuscates it by contending that there is no conflict between the Circuits.

Class-action plaintiffs' analysis is one directed at where the actions complained of are legislative in character and not, as here, where the action complained of is that of an administrative agency decision subject to state court review.[2] This Petition raises the issue as to whether federal courts will become "super administrative agencies" and not allow the state judiciary to correct any errors committed by state and local agencies.

By applying their analysis that studiously avoids addressing the issue raised by the City, class-action plaintiffs claim that no conflicts exist between the Circuits as to whether administrative agency decisions subject to state court review can give rise to a federal claim. In *Littlefield v. City of Afton*, 785 F.2d 596 at 603-605 (8th Cir. 1986), a case cited by class-action plaintiffs, and in accord with the Third Circuit's decision, the Eighth Court discusses in detail the conflict that exists between the Circuits. The Third Circuit in *Cohen v. City of Philadelphia*, 736 F.2d 81, *cert. denied*, 469 U.S. 1019, 105 S.Ct. 6341, a decision apparently overruled by that Circuit's decision in this case, stated (p. 86):

> We thus join the *First and Seventh Circuits in holding that substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary.* Any other holding would lead to the danger that: any plaintiff in state court who was asserting a right within the broadly defined

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[2] *City of Cleburne v. Cleburne Living Center*, —— U.S. ——, 105 S.Ct. 3249 (1985) is not applicable for reasons set forth on pp. 4-5 of the City's Petition. A review of the main and amicus briefs filed by the parties in *Cleburne* shows that the issue being raised in the instant matter was not before this Court in that case. The Texas and Fifth Circuit cases cited by the City show that denials of special-use permits under Texas law are considered legislative in nature and not subject to judicial review, unlike Pennsylvania law where they are administrative in nature and subject to judicial review as to the propriety of the decision.

> categories of liberty or property and who lost his case because the Judge made an error could attack the judgment indirectly by suing the judge under Section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. . . . (Emphasis added).[3]

By not following *Cohen* and holding that an administrative agency denial of a zoning application does create a federal claim, the Third Circuit places itself at variance with decisions in the First, Second and Seventh Circuits and in accord with the Fifth and Eighth Circuits.

The decisions of the various Circuits show a conflict between them as to whether administrative agency decisions can give rise to Section 1983 violations and a reading of their opinions shows as well the extreme difficulty they are having in addressing this issue.

Other arguments raised by class-action plaintiffs are dealt with in the City's Petition.

Respectfully submitted,

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[3] The First and Seventh Circuit decisions relied upon are *Roy v. City of Augusta*, 712 F.2d 1517, 1524 (1st Cir. 1983); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir.), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982); and *Albery v. Reddig*, 718 F.2d 245, 249 n.7 (7th Cir. 1983).